(22,899)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1913.

No. 112.

ATLANTIC COAST LINE RAILROAD COMPANY,
PLAINTIFF IN ERROR,

vs.

CITY OF GOLDSBORO, NORTH CAROLINA.

IN ERROR TO THE SUPREME COURT OF THE STATE OF NORTH CAROLINA.

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a In the Supreme Court of the State of North Carolina, Sixth District.

No. 223.

ATLANTIC COAST LINE RAILROAD COMPANY
vs.
CITY OF GOLDSBORO.

Petition for Writ of Error.

The Atlantic Coast Line Railroad Company, appellant in this cause, comes now and respectfully states that it was and is aggrieved by the judgment entered in this cause, in this Court, on the 31st day of May, 1911, in that in said judgment and the proceedings had prior thereto in this case, certain errors were committed to its prejudice;

That this is an action brought under the laws of North Carolina and the Constitution of the United States by the Atlantic Coast Line Railroad Company, petitioner, against the City of Goldsboro, defendant.

It appears from the record that the said railroad company was duly chartered by the Legislature of North Carolina in the year 1833 as the Wilmington and Raleigh Railroad Company; that the Atlantic Coast Line Railroad Company is the lawful successor to the property, rights and franchises of the said Wilmington and Raleigh Railroad Company; that the charter of the said Wilmington and Raleigh Railroad Company gave to said company the right to purchase and hold in fee simple lands necessary for its purposes, and also gave the said company the right to enter upon and condemn for its purposes such lands as it needed, in cases where it could not agree with the owners thereof as to the compensation to be paid therefor,
b and further provided that the said company should have the same power over said land so laid off as provided in said charter, as though they owned the fee simple therein.

It further appears from said record that in the year 1837, the said Wilmington and Raleigh Railroad Company purchased by deed of bargain and sale in fee simple from A. Borden a strip of land one hundred and thirty (130) feet in width, and that it condemned under its charter certain other tracts of land, continuing said one hundred and thirty foot strip, which said strip of land is located through what is now the City of Goldsboro, North Carolina.

It further appears from said record that the Town of Goldsboro was chartered by the General Assembly of North Carolina in 1844, and that its name has been changed by law to City of Goldsboro.

That after the organization of the town, and while the railroad was using and operating on the said right of way, the town laid out streets, among which it laid out East Center Street on the east side of said track on the land purchased from said Borden, and con-

demned as aforesaid, and running parallel therewith; and West Center Street, on the west side of said track, and running parallel therewith; that the said streets as platted and laid out by said town extended to the center of the railroad track; that other cross streets were also laid out by the said town.

That the said Wilmington and Raleigh Railroad Company and its successors, including the Atlantic Coast Line Railroad Company, have continuously used and operated its said tracks, located on the said land, from the date of its purchase up to the present time.

It further appears from said record that the City of Goldsboro has the right, under its charter, to condemn lands for
c public streets, but it does not appear that any condemnation has ever been had of the lands of this petitioner.

It further appears that on November 1, 1909, the Board of Aldermen of the City of Goldsboro duly adopted an ordinance, providing:

(1) That it should be unlawful for any railroad to operate more than four miles an hour through said town;

(2) Fixing the shifting limits on East and West Center Streets, so as to eliminate four blocks of the track of this petitioner;

(3) Making it unlawful for this petitioner to do any shifting on East and West Center streets between Spruce and Ash, except between 6:30 and 8:30 A. M., and 4:30 and 6:30 P. M.;

(4) Making it unlawful for this petitioner to stand any car on its tracks on East or West Center Street for more than five minutes;

(5) Requiring this petitioner to lower the grade of its said tracks so as to make the same conform to the grade of East and West Center Streets between Walnut and Vine streets; and further requiring this petitioner to fill in between the rails of its said tracks at such established grade, and imposing penalty of Fifty Dollars for each failure to comply with any of the provisions of said ordinance.

This petitioner thereupon applied for and obtained a temporary restraining order from the Superior Court of Wayne County, restraining the City of Goldsboro from enforcing the terms of said ordinance until the hearing. At the hearing an injunction was refused by said Superior Court, and this petitioner appealed
d to the Supreme Court of the State of North Carolina, which said Court by the judgment hereinbefore referred to, dismissed its said appeal, and refused the injunction aforesaid.

That in this action and in the judgment rendered therein in said Supreme Court of North Carolina there was drawn into question a consideration of certain of the Articles and Amendments of the Constitution of the United States, to-wit: Section 10 of Article 1 of said Constitution, and the Fourteenth Amendment to said Constitution.

That the decision of this Court is against the ti-le and right claimed by said Atlantic Coast Line Railroad Company, appellant, and as it is informed and believes, is contrary to Section 10, Article I, of said Constitution, and is contrary to said Fourteenth Amendment of said Constitution, relating to impairing the obligation of a contract between the State and this appellant, and relating to the right of the municipality of Goldsboro to deprive this appellant of its property without due process of law, and without compensation

therefor, by the enactment and enforcement of certain ordinances of said City; and said judgment and decision is, as this petitioner, Atlantic Coast Line Railroad Company, believes, contrary to the provisions of said Constitution of the United States, as aforesaid, all of which will more fully appear in detail from the assignment of errors filed herein.

Wherefore the said Atlantic Coast Line Railroad Company, petitioner, respectfully prays that a writ of error may issue to the Supreme Court of the State of North Carolina, for the correcting of the errors complained of, and that a duly authenticated transcript of the records and proceedings herein may be sent to the United States Supreme Court.

ATLANTIC COAST LINE RAILROAD COMPANY,
By GEO. B. ELLIOTT,
F. W. McKENNEY,
GEO. M. ROSE, *Its Counsel.*

In the Supreme Court of the United States.

ATLANTIC COAST LINE RAILROAD COMPANY, Plaintiff in Error,
vs.
CITY OF GOLDSBORO, Defendant in Error.

Assignment of Error on Writ of Error to Supreme Court of North Carolina.

Comes now the plaintiff in error in the above entitled cause and avers and shows that in the record and proceedings in said cause the Supreme Court of the State of North Carolina erred, to the grievous injury and wrong of the plaintiff in error herein, and to the prejudice and against the rights of the plaintiff in error, in the following particulars, to-wit:

1. That the said ordinance establishing shifting limits beyond which the plaintiff in error could not operate its shifting engines and cars upon its own tracks, located on its own property, through the city of Goldsboro, was in violation of the provisions of Section 10 of Article I of the Constitution of the United States, in that it impaired the obligation of the contract made between the plaintiff in error and the State of North Carolina upon the granting of the charter to the Wilmington and Raleigh Railroad Company, whereby said Railroad Company was granted the right to exercise its franchise and to operate trains and engines over its tracks, and that the Supreme Court of North Carolina was in error in holding that said ordinance was not contrary to said Section 10 of Article I of said Constitution.

2. The said Supreme Court erred in holding that the ordinance of the City of Goldsboro, prohibiting the plaintiff in error from operating its shifting engines and cars over certain portions of its

track in the city of Goldsboro, except between the hours of 6:30 and 8:30 A. M., and 4:30 and 6:30 P. M., did not impair the obligation of the contract between the said railroad company and the State, granting its franchise, in violation of the provisions of Section 10, Article I, of the Constitution of the United States, and did not amount to the taking of its property, contrary to the provisions of the Fourteenth Amendment of said Constitution.

3. The said Supreme Court erred in holding that the ordinance of the city of Goldsboro, prohibiting the plaintiff in error from placing or standing any cars for a longer period than five minutes on its tracks in the city of Goldsboro between Spruce and Ash streets, was not contrary to the provisions of Section 10, Article I, of the Constitution of the United States, and the provisions of the Fourteenth Amendment to said Constitution, in that said ordinance impaired the obligation of the contract, and deprived said plaintiff in error of its property without due process of law.

4. The said Supreme Court erred in holding that the ordinance of the city of Goldsboro, requiring the plaintiff in error to lower its tracks located on its right of way, purchased in fee simple, so as to conform to the grade of what is known as East and West Center Street in the city of Goldsboro, and to fill in said tracks between the rails, was not contrary to the provisions of the Fourteenth Amendment of the Constitution of the United States, and in holding that said ordinance did not deprive plaintiff in error of its property without due process of law, and without adequate compensation therefor.

g 5. The said Supreme Court erred in holding that under the record in this cause, and the Constitution and laws of the United States relating thereto, that the right of way of the plaintiff in error was a public street.

6. The said Supreme Court erred in holding that under the record in this cause, and the Constitution and laws of the United States relating thereto, that the plaintiff in error was not entitled to equitable relief sought.

7. The said Supreme Court erred in not reversing the judgment of his Honor, Judge Adams, at the hearing in the trial court in this cause, and in not giving to the plaintiff in error its rights under the Constitution and laws of the United States, as the owner in fee simple of the right of way in question whereon its tracks are located, and whereon it seeks to operate its locomotives and cars as authorized by its charter and the laws of North Carolina.

Wherefore for these and other manifest errors appearing in the record, the said Atlantic Coast Line Railroad Company, plaintiff in error, by its counsel, prays that the judgment of the said Supreme Court of North Carolina be reversed and set aside, and held for naught, and that judgment be rendered for the plaintiff in error, granting its rights under the Constitution and laws of the United States, and permanently enjoining and restraining the said City of Goldsboro from enforcing or attempting to enforce the provisions of the said ordinance hereinbefore referred to, to the wrong of the

said plaintiff in error; and the plaintiff in error also prays judgment for its costs.

ATLANTIC COAST LINE RAILROAD COMPANY,
By GEO. B. ELLIOTT,
F. D. McKENNEY,
GEO. M. ROSE, *Its Counsel.*

h UNITED STATES OF AMERICA:

The President of the United States to the Honorable the Justices of the Supreme Court of the State of North Carolina, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the Supreme Court of the State of North Carolina, before you, at the May 31st sitting of the spring term, 1911, thereof, being the highest court of law or equity of the said State, in which a decision could be had in the said suit between the Atlantic Coast Line Railroad Company, plaintiff and appellant, and the City of Goldsboro, North Carolina, defendant and appellee, wherein was drawn in question the validity of a treaty or statute of, or an authority exercised under said State, on the ground of their being repugnant to the Constitution, treaties or laws of the United States, and the decision was in favor of such their validity, or wherein was drawn in question the validity of a treaty or statute of, or an authority exercised under, the United States, and the decision was against their validity; or wherein was drawn in question the construction of a clause of the Constitution, or of a treaty, or statute of, or commission held under the United States, and the decision was against the title, right, privilege or exemption, specially set up or claimed under such clause of the said Constitution, treaty, statute or commission; a manifest error hath happened to the great damage of the said Atlantic Coast Line Railroad Company as by its complaint appears.

We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court at Washington within thirty (30) days from the date hereof, that the record and proceedings aforesaid, being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, i and according to the laws and customs of the United States, should be done.

Witness, the Honorable Edward Douglas White, Chief Justice of the Supreme Court of the United States, this 14th day of July, in the year of our Lord one thousand, nine hundred and eleven.

Done in the City of Raleigh and County of Wake, State of North

Carolina, with the seal of the Circuit Court of the United States for the Eastern District of North Carolina attached.

[Seal United States Circuit Court, Eastern Dist. of N. C.]

H. L. GRANT,
Clerk of the United States Circuit Court for the Eastern District of North Carolina.
By GEO. L. TONUOFFSKI,
Dep. Clk.

Allowed by

WALTER CLARK,
Chief Justice of the Supreme Court of the State of North Carolina.

j UNITED STATES OF AMERICA, *ss:*

The President of the United States to City of Goldsboro, North Carolina, a Municipal Corporation, Greeting:

You are hereby cited and admonished to be and appear at and before the Supreme Court of the United States at Washington, D. C., within thirty days from the date hereof, pursuant to a writ of error filed in the office of the Clerk of the Supreme Court of the State of North Carolina, wherein the Atlantic Coast Line Railroad Company is plaintiff in error, and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error as in said writ of error mentioned, should not be corrected, and why speedy justice should not be done the parties in that behalf.

Witness, the Chief Justice of the Supreme Court of the State of North Carolina, this 14 day of July, 1911.

WALTER CLARK,
Chief Justice of the Supreme Court of the State of North Carolina.

[Seal of the Supreme Court of the State of North Carolina.]

Attest:
THOS. S. KENAN,
Clerk of the Supreme Court of the State of North Carolina.

Service of this Citation accepted.

C. B. AZCOCK,
R. W. WINSTON,
Solicitors for Defendant in Error.

Sept. 11, 1911.

k In the Supreme Court of the State of North Carolina.

ATLANTIC COAST LINE RAILROAD COMPANY
vs.
CITY OF GOLDSBORO.

Comes now the Atlantic Coast Line Railroad Company, the appellant above named, by counsel, on this 14th day of July, 1911, and files and presents to this Court, its petition, praying for the allowance of a writ of error intended to be urged by it; and praying further that a duly authenticated transcript of the records, proceedings and papers upon which the judgment herein was rendered, may be sent to the Supreme Court of the United States; and that such other and further proceedings may be had in the premises as may be just and proper; and upon consideration of the said petition, this Court desiring to give petitioner an opportunity to test in the Supreme Court of the United States, the questions therein presented, it is ordered by this Court that writ of error be allowed, as prayed, provided, however, that the said Atlantic Coast Line Railroad Company, appellant, give bond according to law in the sum of One Thousand Dollars ($1,000).

In testimony whereof, witness my hand this 14 day of July, 1911.

WALTER CLARK,
Chief Justice of the Supreme Court of the State of North Carolina.

l In the Supreme Court of the United States.

ATLANTIC COAST LINE RAILROAD COMPANY, Plaintiff in Error,
vs.
CITY OF GOLDSBORO, Defendant in Error.

Bond on Writ of Error.

Know all men by these presents: That we, Atlantic Coast Line Railroad Company, as principal, and the American Surety Company of New York, as surety, are held and firmly bound unto the City of Goldsboro in the sum of One Thousand ($1,000.00) Dollars, to be paid to it and for the payment of which, well and truly to be made, we bind ourselves, successors and assigns, jointly and severally, firmly by these presents.

Sealed with our seals and dated the 14th day of July, 1911.

Whereas the above named Atlantic Coast Line Railroad Company, plaintiff in error, seeks to prosecute its writ of error in the Supreme Court of the United States to reverse the judgment rendered in the above entitled action by the Supreme Court of the State of North Carolina.

Now therefore the condition of this obligation is such that if the above named plaintiff in error shall prosecute its writ of error to

effect and answer all costs and damages that may be adjudged, if it shall fail to make good its plea, then this obligation to be void, otherwise to remain in full force and virtue.

ATLANTIC COAST LINE RAILROAD COMPANY,
By F. D. EMERSON, *President.*

[Seal Atlantic Coast Line Railroad Company, Incorporated in Virginia.]

Attest:
GEO. B. ELLIOTT,
Ass't Secretary.

m AMERICAN SURETY COMPANY OF NEW YORK,
By JOHN D. BELLAMY,
Resident Vice-President.

[Seal American Surety Company of New York.]

Attest:
WAYTON PILER,
Resident Assistant Secretary.

1 ATLANTIC COAST LINE RAILROAD COMPANY
against
CITY OF GOLDSBORO.

(From Wayne.)

Before W. J. Adams, J.

Plaintiff Appealed.

Summons for Relief.

Be it remembered that on the 19th day of November, 1909, the Atlantic Coast Line Railroad Company sued out a summons from the court in these words and figures:

WAYNE COUNTY:

In the Superior Court.

ATLANTIC COAST LINE RAILROAD COMPANY
against
CITY OF GOLDSBORO.

The State of North Carolina to the Sheriff of Wayne County, Greeting:

You are hereby commanded to summon City of Goldsboro, the defendant above named if it be found within your county, to be and

appear before the Judge of our Superior Court at a court to be held for the County of Wayne at the court house in Goldsboro on the twelfth Monday after the first Monday of September, 1909, it being the 29th day of November, 1909, and answer the complaint, which will be deposited in the office of the Clerk of the Superior Court of said county within the first three days of said term, and let the said defendant take notice that if it fail to answer the complaint
2 within the time required by law, the plaintiff will apply to the court for the relief demanded in the complaint.

Hereof fail not, and of this summons make due return.

Given under my hand and seal of said court this 19th day of November, 1909.

JAS. R. HATCH,
Clerk Superior Court.

Returnable to November Term, 1909, of the Superior Court for Wayne County.

Received November 19, 1909. Served November 22, 1909, by reading and delivering a copy to J. R. Higgins, Mayor, and D. J. Broadhurst, Clerk and Secretary of the City of Goldsboro.

E. A. STEVENS,
Sheriff Wayne County,
By J. A. TAYLOR, *D. S.*

And thereupon the said Atlantic Coast Line Railroad Company comes and complains as follows:

Complaint.

NORTH CAROLINA,
Wayne County:

In the Superior Court, November Term, 1909.

(Title of Cause.)

The plaintiff for its complaint alleges:

1. That the Wilmington & Raleigh Railroad Company was incorporated by the General Assembly of North Carolina at its session of 1833, giving the corporators the privilege of constructing a railroad from Wilmington, N. C., to Raleigh, N. C.

2. The General Assembly of North Carolina at its session of 1835 amended the above recited act, giving the stockholders of the said Wilmington & Raleigh Railroad Company the "liberty to run a railroad from some point at or near the town of Wilmington, to some point in the city of Raleigh, or in the near neighbor-
3 hood thereof; or from Wilmington, or near it as preferred, to some point on the River Roanoke in this State, at the election of said stockholders."

3. That the stockholders elected to run said railroad from Wilmington to Weldon, on the Roanoke River.

4. That for the purpose of enabling the construction of said road

there was conveyed in fee simple, to the Wilmington & Raleigh Railroad Company, a strip of land 130 feet wide extending through what is now the city of Goldsboro, from north to south.

5. That said railroad was constructed along, over and across that portion of said right of way which now extends through the city of Goldsboro before the incorporation of the town of Goldsboro.

6. That subsequent to the time of the construction of said line of railroad to-wit, on the — day of ——, the town of Goldsboro was incorporated, and by various amendments to the charter thereof, the limits of said town have been enlarged, and the name has been changed to that of the city of Goldsboro.

7. The General Assembly of North Carolina, by an act ratified on the 14th day of February, 1855, changed the name of the Wilmington & Raleigh Railroad Company to that of the Wilmington & Weldon Railroad Company, which road has been merged in, and transferred to the plaintiff, the Atlantic Coast Line Railroad Company, which company now owns all the right, title and interest of the Wilmington & Raleigh Railroad in and to the right of way herein above referred to.

8. The General Assembly of North Carolina, at its session of 1848-49, incorporated the North Carolina Railroad Company with power in its corporators to construct a railroad from the town of Charlotte, in the State of North Carolina, to the Neuse River, where the Wilmington & Raleigh Railroad passes over the same.

9. The General Assembly of North Carolina at its session of — amended the said last recited act, so as to extend the construc-
4 tion of said railroad to the town of Goldsboro, N. C.

10. That under the power given said corporators by said act, and the amendments thereto, and by permission of the Wilmington & Raleigh Railroad, or Wilmington & Weldon, and in accordance with an agreement made with said company, entered said town of Goldsboro at its southern boundary, and laid its tracks along the right of way of the plaintiff company, and constructed its warehouses on said right of way in the northern part of said town.

11. That the General Assembly of North Carolina, at its session of 1851-52 incorporated the Atlantic & North Carolina Railroad Company, with power in its corporators to construct a railroad, "from the most eligible point on the harbor of Beaufort, Carteret County, this to New Bern, Trenton, and Kinston, so as to strike the Raleigh & Wilmington Railroad, and connect with the North Carolina Railroad Company, at its termination near the town of Goldsboro."

12. That under the power given in said act and incorporation, and amendments thereto, and by the consent of the Wilmington & Weldon Railroad and in accordance with an agreement with said company, the said Atlantic & North Carolina Railroad Company entered said town at its northern boundary, and laid its track along the right of way of the plaintiff to a point at or near Walnut street near the southern portion of said town, and constructed its ware-

house on the right of way of the plaintiff, near the northern boundary of Goldsboro.

13. That since the incorporation of the town of Goldsboro, or at least for a great many years, the right of way of the plaintiff company not so occupied by the roadbeds of the plaintiff company, and of the North Carolina Railroad Company, and of the Atlantic & North Carolina Railroad Company, and warehouses of the two last named companies have been known as East Center street and
5 West Center street, and the said portions of the said right of way through Goldsboro has been used and kept in repair by the town or city of Goldsboro. That these uses of said right of way as streets by the town and city of Goldsboro, has been by consent, and with the permission of the plaintiff, and the Wilmington & Weldon Railroad Company, and the Wilmington & Raleigh Railroad Company.

14. That while said portion of said right of way so occupied has been used and repaired as a street by the corporate powers of the town and city of Goldsboro. There never has been any condemnation of said right of way of said street, nor have the municipal authorities of Goldsboro had the power or authority to condemn such right of way to such use; nor has the plaintiff or the Wilmington & Weldon or Wilmington & Raleigh Railroad Company been compensated by the municipal authorities of Goldsboro, for the use of its right of way, so occupied as a street.

15. That no part of that portion of the plaintiff's right of way so occupied by the roadbeds of the plaintiff, the North Carolina Railroad Company, and the Atlantic & North Carolina Railroad Company, and the warehouses of the two last named companies, is now or ever has been used or repaired by the municipal authorities of Goldsboro as a street, except perhaps that portion thereof between Walnut and Chestnut streets, which was heretofore used as the passenger station, may have been used but not repaired as a street, and this with the permission and consent of the plaintiff.

16. That while such portion of said right of way as is so occupied by the roadbeds and warehouses of said companies, is not nor never was used as a street, yet in common parlance and in the charter and ordinances of the city of Goldsboro, the whole of the right of way of the plaintiff company is spoken of as constituting East and West Center streets.

17. That at a meeting of the Board of Aldermen of the city of Goldsboro on the first day of November, 1909, the following ordinances were passed, to-wit:

6 "SECTION 1. That it shall be unlawful for any railroad or railway company to operate or run any through or local freight train or any passenger train through the city of Goldsboro, on East or West Center streets at a rate of speed exceeding four miles per hour, and said railroad and railway companies are hereby required to have flagmen to proceed fifty feet in front of each and every through or local freight train or passenger train, to warn persons of the approach of said train. Any railroad or railway com-

pany violating this ordinance shall be subject to a fine of fifty dollars for each offense.

"SEC. 2. That the shifting limits on East and West Center streets shall be on the south from Spruce street to the city limits, and north from Ash street to city limits.

"SEC. 3. That it shall be unlawful for any railroad or railway company to do any shifting on East and West Center streets, between Spruce and Ash streets, at any other time than from the hours of 6:30 to 8:30 a. m. and from 4:30 to 6:30 p. m. Any railroad or railway company violating this ordinance shall be subject to a fine of fifty dollars for each offense.

"SEC. 4. That it shall be unlawful for any railroad or railway company to place any car and allow said car to stand for a longer period of time than five minutes at any point on East and West Center streets, between Spruce and Ash streets. Any railroad or railway company violating this ordinance shall be subject to a fine of fifty dollars for each offense.

"SEC. 5. That all railroad and railway companies owning tracks on East or West Center streets between Walnut and Vine streets in said city of Goldsboro are hereby required to lower said tracks, so as to make the same conform to the grade line of said streets, and said tracks to be filled in between the rails; the grade line of said street being as follows: Beginning at the present grade line, corner of Walnut and East and West Center streets, to be lowered
7 six inches to corner of Mulberry and East and West Center streets, ten inches to corner of Ash and East and West Center streets, eighteen inches to corner of Oak and East and West Center streets, and eighteen inches to corner of Vine and East and West Center streets.

"SEC. 6. That any railroad or railway company failing or refusing to comply with the above ordinance shall be guilty of a misdemeanor and fined fifty dollars, and each and every day that said tracks are allowed to remain shall constitute a separate offense.

"That these ordinances go into effect on November 20, 1909, with the exception of Section 5, which shall go into effect ninety days from this date, November 1, 1909."

18. That the exercise of the privilege by the plaintiff of the acts forbidden in said ordinance is of great value and benefit to the plaintiff, and are in the discharge of its charter rights upon property belonging to itself, and the enforcement of said ordinance forbidding the plaintiff to shift its cars, and to let them stand temporarily for the purpose of loading and unloading on its own right of way between the points designated in said ordinances, would greatly impair the franchise of the plaintiff, and the value of its property to its irreparable damage.

19. That the intent and legal effect of the passage, and the enforcement of said ordinance by the city of Goldsboro, would be to exercise the power of eminent domain, and to condemn the right of way of the plaintiff, the Atlantic Coast Line Railroad Company to the use of the city for a street without taking the proper steps for

the condemnation of said property to the use of the city, and without having taken any steps for compensating the plaintiff for the use of its property; and without complying with the requirements of Section 37 of the defendant's charter, which provides for the condemnation of property for the use of streets, and which provides
8 that in case the city and the owner of the property to be appropriated, can not agree on the price, that each of the parties shall select an arbitrator, with power of said arbitrators to select an umpire whose decisions as to the damage shall be conclusive. That this attempt on the part of the city to condemn the property of the plaintiff for the use of the street without complying with the form of law, and without compensation, renders Sections 2, 3, 4, 5, 6 void, and the enforcement of said ordinance and the condemnation of the right of way of the plaintiff company would work irreparable damage to the plaintiff. That the plaintiff has no remedy at law by which it can defend itself from said unlawful appropriation of its property for the use of the defendant; except by subjecting itself to innumerable actions for penalties for violation of said ordinances, which in the aggregate would amount to a very large sum of money.

20. That the shifting of cars and allowing them to stand within the limits prescribed in Sections 2, 3, 4 of said ordinance, is done for the purpose of exchanging business between the various railroads centered at Goldsboro, and for the purpose of accommodating persons engaged in business in said city, and is a great and mutual benefit to the plaintiff and to its patrons, the public, engaged in doing business in said city. That the portion of said city in which shifting is forbidden except at certain hours, and in which cars are forbidden to stand for more than five minutes at a time, is almost if not entirely occupied by business houses, and manufacturing enterprises, many of whom are engaged in wholesale business, and the privilege of loading and unloading their produce in said limits is a great benefit to them and to the trade of the city. The time in which the shifting is allowed within said limits, is entirely inadequate to meet the requirements of the plaintiff and its patrons, and the five minutes allowed them for a car to stand within said limits is wholly inadequate for the purpose of their loading and unloading the same, and the enforcement of said ordinance
9 would greatly cripple if not destroy all use by the plaintiff of its right of way through the city of Goldsboro, and would thus impair its charter rights under the various contracts had with the State of North Carolina in contravention and violation of Article 10 of the Constitution of the United States, that the exercise of said right to shift cars and allow its cars to stand upon its tracks in the said limits is injurious to the rights of no one, and is wholly beneficial to the plaintiff and its patrons.

21. That the track- of the plaintiff between Walnut and Vine streets in the city of Goldsboro are elevated very little if any above the surface of the right of way of the plaintiff along and over which they run, and at points at which the streets of the city of Goldsboro cross said right of way and the track, the surface of the right of way

is made even with the track and the passage of all vehicles of all kinds over said track and the other tracks of the other roads on said right of way at said crossing, is safe, easy and convenient, and the requirement that the plaintiff and the other railroads using and occupying said right of way, should lower their tracks in the manner and to the extent required in Section 5 of said ordinance, would incur such expense upon the plaintiff as would amount to the virtual confiscation of the property of the plaintiff and would necessarily result in the abandonment of its right of way by the plaintiff. That in addition to the actual expense of conforming that portion of its right of way to the requirements of said section of said ordinance, such conformance would derange the entire grade of the plaintiff's railroad and necessitate a change thereof conforming to the change required by said ordinance, the expense of which it would be impossible to compute, without a thorough and expensive survey. That such change would be of no practicable benefit to any person whatever, and in no wise convenience the citizens of the city of Goldsboro, and is not required by the necessities of the people.

22. That the only purpose that could be served by the
10 lowering of the rails of the plaintiff, and of the other roads occupying the plaintiff's right of way, within said limits as required by Section 5 of said ordinance, would be to conform the same to a contemplated change in grade of the right of way of the plaintiff by the city of Goldsboro, and to enable the citizens of the city of Goldsboro to use the entire right of way of the plaintiff within those limits for a driveway, notwithstanding the fact that it is occupied by the rails of the plaintiff company, and by the yard and switch tracks of the plaintiff company and of the North Carolina Railroad, and the Atlantic & North Carolina Railroad Company, which switch tracks and yards are absolutely necessary to the discharge of the duties that said railroads owe to the public. That such an appropriation of the tracks and right of way of the plaintiff to the use of the public, without compensation, would be in violation of the spirit of the Constitution of the State of North Carolina and of the 14th Amendment of the Constitution of the United States, which provides, that, "No State shall make or enforce any law which shall abridge the privilege or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property without due process of law."

23. That the enforcement of the said ordinance in its entirety or separate sections of said ordinance, could serve no useful public purpose, and could result only in injury to the plaintiff and the practical confiscation of its property.

24. That Section 5 of said ordinance is void by reason of the fact that the defendant, the city of Goldsboro, has no authority to order the change of grade in the railroad. The only authority given said city with reference to railroads, being that contained with reference to the speed of trains in Section 55 of its charter.

25. That the penalties prescribed for violations of said ordinance are so large and unreasonable that they make it practically
11 impossible for the plaintiff to test their validity by an exercise of its constitutional rights in the legitimate use of its own

property, and an enforcement thereof against the plaintiff for such exercise of its rights in violation of said ordinances would virtually amount to depriving the plaintiff of its property without due process of law.

26. That the enforcement of Sections 2, 3, 4, 5, 6 of said ordinance would result in the destruction, or very great impairment of the franchise of the plaintiff, the Atlantic Coast Line Railroad Company, by which it is authorized to conduct its business on, along and over that portion of its right of way in the city of Goldsboro, and against which wrong, and destruction of its property, the plaintiff would have no adequate remedy at law for damages, and the enforcement of said sections would result in irreparable damage to the plaintiff.

Wherefore, the plaintiff demands judgment that the defendant be perpetually restrained from the enforcement of said sections of said ordinance against the plaintiff, and from the appropriation of its right of way to its own use, without authority of law, and without compensation, and from impairing and destroying the plaintiff's franchise in its right of way.

GEO. B. ELLIOTT,
GEO. M. ROSE,
W. C. MUNROE,
Attorneys for Plaintiff.

J. L. Royall, being duly sworn says, that he is the local agent of the Atlantic Coast Line Railroad Company at Goldsboro, N. C., that the above complaint is true of his own knowledge except as to those matters and things therein stated on information and belief, and as to those he believes it to be true.

J. L. ROYALL.

Sworn to and subscribed before me this the 19th day of November, 1909.

JAS. R. HATCH, *C. S. C.*

Filed November 19, 1909.

JAS. R. HATCH, *C. S. C.*

12 NORTH CAROLINA,
Wayne County:

In the Superior Court.

(Title of Cause.)

For the reasons set forth in the annexed affidavit, the city of Goldsboro is hereby commanded to appear before W. R. Allen, Judge of the Sixth District, at Goldsboro on the 9th day of December, 1909, and show cause why a restraining order should not issue against it as therein prayed; and in the meantime the defendant, the city of Goldsboro, its officers and agents, are hereby commanded to refrain from enforcing Sections 2, 3, 4, 5, 6 of the ordinance of November 1st, 1909, a copy of which is set out in said affidavit, against the

plaintiff, the Atlantic Coast Line Railroad Company, and from otherwise interfering with its right of way through the city of Goldsboro.

Upon the plaintiff filing with the Clerk of the Superior Court of Wayne County an undertaking in the Sum of Five Hundred Dollars to pay to the defendant such damages and costs as it may suffer by reason of the issuing of the above restraining order, this order will issue.

O. H. ALLEN,
Judge of the Fifth Judicial District.

This the 20th day of November, 1909.

NORTH CAROLINA,
Wayne County:

In the Superior Court.

(Title of Cause.)

Whereas, the plaintiff has applied for a restraining order in the above entitled cause against the defendant; now therefore the plaintiff and its surety undertake in the sum of Five Hundred Dollars, that the plaintiff will pay to the defendant such damages, not exceeding the sum of Five Hundred Dollars, as it may sustain
13 by reason of the injunction, if the court shall finally decide that the plaintiff was not entitled thereto. This the 20th day of November, 1909.

ATLANTIC COAST LINE RAILROAD COMPANY,
By its Attorney, W. C. MUNROE.
THE TITLE GUARANTY & SURETY CO., [SEAL.]
By GEO. E. HOOD, *Attorney in Fact.*

This bond approved this the 20th day of November, 1909.
JAS. R. HATCH, *C. S. C.*

Received November 20th, 1909. Served November 20th, 1909, by delivering a copy of the within order and undertaking and the annexed complaint and affidavit to J. R. Higgins, Mayor, and D. J. Broadhurst, Clerk and Secretary of the city of Goldsboro.

E. A. STEVENS, *Sheriff,*
By J. A. TOLER, *D. S.*

The defendant, the city of Goldsboro, comes through its attorneys, and pleads as follows:

Answer.

NORTH CAROLINA,
Wayne County:

In the Superior Court, November Term, 1909.

(Title of Cause.)

The defendant answering the complaint herein, for its answer, says:

1. That paragraph one thereof is admitted.
2. That paragraph two thereof is admitted.
3. That paragraph 3 thereof is admitted.
4. That the defendant has no knowledge nor information sufficient to form a belief as to the facts alleged in paragraph four thereof, and therefore denies the same.
5. That so much of paragraph five thereof as alleges that
14 said railroad was constructed through the city of Goldsboro, before the incorporation of the town, is admitted, but as to the rest of said paragraph this defendant has no knowledge nor information sufficient to form a belief, and therefore denies the same.
6. That paragraph six thereof is admitted.
7. That paragraph seven thereof is admitted except in so far as it alleges that the plaintiff now owns all the right, title and interest of the Wilmington & Raleigh Railroad in and to the right of way therein above referred to, and as to this, the defendant has no knowledge nor information sufficient to form a belief, and therefore denies the same; and in connection therewith, this defendant avers that the plaintiff by constructing and operating a different line of railway in, around, by and through the city of Goldsboro than the one in said paragraph referred to, has abandoned the said original right of way and is no longer entitled to use the same for any purpose whatever.
8. That paragraph eight thereof is admitted.
9. That paragraph nine thereof is admitted.
10. That as to the facts alleged in paragraph ten thereof, this defendant has no knowledge nor information sufficient to form a belief, and therefore denies the same.
11. That paragraph eleven thereof is admitted.
12. That as to the facts alleged in paragraph twelve thereof, this defendant has no knowledge nor information sufficient to form a belief, and therefore denies the same.
13. That paragraph thirteen thereof is admitted, except that it is denied that the use of the alleged right of way of plaintiff on East and West Center streets by the town and city of Goldsboro was, by consent and with the permission of the plaintiff and the Wilmington & Weldon Railroad Company and the Wilmington & Raleigh Railroad Company. On the contrary, this defendant avers, that it has ever since its organization as a town and the laying out of its

streets, constantly maintained said streets and used the same
15 as it did the other streets of said town, and the plaintiff and
its assignors have always recognized the right and the duty of the town of Goldsboro and of this defendant, to maintain and use said streets as fully and to the same extent as it did the other streets of said town and city.

14. That so much of paragraph 14 as alleges that the defendant never has condemned plaintiff's right of way to said streets is admitted, and it is also admitted that no compensation has been paid by the defendant, or its assignors, for the use of said streets. All the rest of said paragraph is denied.

15. That paragraph 15 thereof is denied, and it is averred that the whole of said alleged right of way of plaintiff has been constantly used by the city and the public generally for more than fifty years, except that part of said alleged right of way which is occupied by the warehouses. It is admitted that the said plaintiff and the other railroads using the said alleged right of way have kept in repair that part of said streets actually occupied by the roadbeds of the said railroads.

16. That paragraph sixteen thereof is denied except in so far as it alleges that the whole of the alleged right of way of the plaintiff company is spoken of in common parlance in the charter and ordinances of the city of Goldsboro as constituting East and West Center streets, and this defendant avers that the same does constitute East and West Center street-, and said streets have for more than fifty years been recognized and treated by the public and the said railways as belonging to and under the control of the defendant, and have been constantly used by the defendant and the public generally for all purposes to which streets are usually put.

17. That paragraph seventeen thereof is admitted.

18. That paragraph eighteen thereof is denied, and it is averred that the plaintiff and the other railroads now using its alleged right
of way over and through East and West Center streets have
16 in use other rights of way which reach said city and are amply
sufficient for all purposes for which said railroads were chartered and organized, and it further avers that the continued use of East and West Center streets, without the restriction of said city ordinances, is and will be accompanied with great dangers to travelers having occasion to use said streets in going up and down and across the same.

19. That paragraph nineteen thereof is denied.

20. That paragraph twenty thereof is denied, and it is alleged in connection therewith that within the limits set out in Sections 2, 3, and 4 of said city ordinances, the said East and West Center streets are almost constantly filled with people going up and down and across said streets on foot and in various vehicles, and that the use of the same by the plaintiff and the other railroads using said alleged right of way is attended with constant danger and great menace to the public so using said streets, and that the plaintiff can furnish ample provision for the accommodation of its patrons by other and inexpensive means.

The defendant further alleges that the eastern spur track between Walnut and Mulberry streets is only 29 feet and 1 inch from the sidewalk of East Center street, and that the same was used and had for a long time been used by the defendant as a receptacle for its loaded freight cars which were placed upon the same and allowed to stand upon the same, sometimes three and four in number, and frequently for several days at a time, the contents of which, consisting of heavy groceries, grain, etc., were permitted by it to be loaded into drays and wagons which were backed up to said cars, and which extended into East Center street towards the sidewalk to such an extent that the said street was obstructed and movement along the same rendered difficult and dangerous, and that this danger was increased by the movement of freight trains and shifting engines over the tracks lying west of the said spur track, and that the business of merchants and dealers on East Center street within the lim-
17 its mentioned were seriously interfered with, and citizens of the city using the said street suffered great and continuous inconvenience; and defendant further alleges that the freight trains and shifting engines of the defendant and the shifting engines of the Southern Railway were continually run along through the said city and sometimes permitted to stand therein and to block the crossings to the inconvenience and danger of the said inhabitants of said city.

In further answer to said paragraph, this defendant avers that an action was brought at the August Term, 1906, of Wayne Superior Court, in the name of Chas. Dewey and others against the Atlantic Coast Line Railroad Company, the purpose of which was to restrain said company and the other railroads mentioned in plaintiff's complaint, from changing their routes and establishing the union depot at the foot of Walnut street, just west of and outside of the then corporate limits of said city; that said plaintiff, among other things, alleged that there were no facts found by the Corporation Commission that would render necessary the removal of said station from the limits of the city, and from the lines of said railway; that in answer to said paragraph, the defendant in said action being the plaintiff in this action, set out in paragraph twenty-six of said answer the following, to-wit: "And it is alleged in connection therewith that while said union passenger depot is not within the corporate limits of the city of Goldsboro, it is so close thereto, as to be rightfully and legally considered in the city, the proposed site being within two hundred and ten feet of the western line of the corporate limits of the city; that said Corporation Commission did find facts fully justifying its order, and in addition to the facts found by the Corporation Commission, this defendant avers that the whole of West Center street and sidewalk for more than two blocks, beginning a short distance south of Vine street and running to Boundary street, is at present completely filled and occupied by the warehouses and tracks of the said railroad
18 and that near the new warehouse of the Atlantic & North Carolina Railroad Company there is very little space left for the use of the public on East Center street, one of the spur tracks

of said company running along and over the sidewalk of said street for some distance; that travel along West Center street is impracticable, and along East Center street is dangerous, while the crossings of said East and West Center streets for the whole length of the city are much less useful than they should be; the use thereof is accompanied with much more danger than there would be if the union passenger station were established as directed by the Corporation Commission; that the operation of the trains along said Center street increases annually and the danger accordingly; that trains are constantly passing, and the crossings, notwithstanding the utmost diligence and care on the part of the railroads, are frequently and necessarily blocked; that said Center street is the main business street in the city, is frequently crowded with pedestrians and vehicles, and the operation of so many trains daily throughout the length of said street is fraught with danger to life and property, all of which would be greatly lessened if the order of the Corporation Commission is permitted to be carried out; that there is no suitable, available place on said street for a union passenger station, and if there were, its use would be subject to all of the foregoing dangers and difficulties." And this defendant avers that the facts in said answer of the Atlantic Coast Line Railroad Company were then and are now true, and that travel along West Center street is impracticable, and along East Center Street is dangerous, while the crossing of said East and West Center streets for the whole length of the city are much less useful than they should be; the use thereof is accompanied with much danger; that trains are constantly passing, and the crossings, notwithstanding the utmost diligence and care on the part of the railroads, are frequently and necessarily blocked; that said Center street is the main business street
19 in the city, is frequently crowded with pedestrians and vehicles, and the operation of so many trains daily throughout the length of said street is fraught with danger to life and property. And this defendant further avers that the plaintiff herein, in paragraph 23 of its said answer, in the said suit of Charles Dewey and others against the Atlantic Coast Line Railroad Company, further alleged "that it is the intention of this defendant, if said passenger station is located in accordance with the order of the Corporation Commission, to deflect as many of its trains, both freight and passenger, as is practicable, from said tracks on Center street to the new track to be built upon the proposed new location." And this defendant further avers that, in violation of said promise on the part of the present plaintiff, it continues to use said track through Center street for its freight trains and shifting engines and thereby to continue the very dangers which it averred rendered it necessary to deflect its track and locate same in accordance with the order of the Corporation Commission. And this defendant further avers that a large number, about one-third of the population of Goldsboro lives west of Center street, while all the schools of said city are located to the east of said street, and it is necessary each day during the school term for about one-third of the children to cross the tracks of the plaintiff, and of the other railroads claiming to

use said alleged right of way, and for this reason, among others, set out by plaintiff in its aforesaid answer, the continued use of East and West Center streets by the plaintiff, without the safeguards proposed in the said ordinances, is fraught with great danger to life and property.

21. Paragraph twenty-one thereof is denied, and it is alleged in connection therewith that the defendant has recently undertaken to pave nearly all of the sidewalks and many of the streets of the city of Goldsboro, and in order to do so has employed a competent and skillful engineer, who has fixed the grades for said streets and sidewalks, and that in order to make the streets and side-
20 walks uniform and most serviceable to the public, and the least dangerous in their use, it is absolutely necessary for the plaintiff herein and the other railroads claiming to use the said alleged right of way, to conform to Section 5 of the ordinances complained of in the complaint, and that obedience to said order can be had without any serious expense or inconvenience to the plaintiff, and the said other railroads.

22. That paragraph twenty-two thereof is denied, but it is averred in connection therewith that the change of grade would allow the public a better use of said street, which it has constantly used for fifty years, than it has theretofore had. This defendant expressly denies that it is attempting to appropriate any right of way belonging to the plaintiff, and it avers that it has always, ever since its organization, been in the actual use and occupation of all of East and West Center streets, except such as, for the time being, was in the actual use of the plaintiff and the other railways, and it further avers that by the relocation of its right of way, had and maintained on its own application, plaintiff, in law, thereby abandoned and lost all right in and to the use of any part of East and West Center streets for its railway line.

23. That paragraph twenty-three thereof is denied.

24. That paragraph twenty-four thereof is denied.

25. That paragraph twenty-five thereof is denied.

26. That paragraph twenty-six thereof is denied.

For a further defense this defendant avers that the plaintiff herein in relocating its line, left its original line at a point about one-half mile south of the city of Goldsboro, and ran to the west of said city at some points more than one-fourth mile away from its original line, and reconnects with its original line at a point some two miles north of the city of Goldsboro; that the freight warehouse of the plaintiff is in the southern part of the city and can be reached easily by said road without running through the city of Goldsboro at all; that the Southern Railway, in relocating its route, instead of running as the old route did, to the southern part of said
21 city and then turning north on Center street, deflected its line, beginning at a point just east of Little River, more than two miles from the city of Goldsboro, and runs northeastwardly to the present union station, and again east, reaching its freight depot, which is situated in the northern part of said city, without running any trains through the main part of said city; that

the Atlantic & North Carolina Railroad, instead of running down Center street from the north to its old stopping place runs along Beach street in the northern part of said city, which is in a sparsely settled section thereof, and connects with said union depot, and can make its freight station without the use of the business portion and residential portion of Center street.

Wherefore the defendant prays judgment that the action against it be dismissed for costs and for such other and further relief as to the court may seem proper.

____ ____,
Attorneys for Defendant.

NORTH CAROLINA,
Wayne County:

John R. Higgins, being duly sworn deposes and says, that the defendant is a municipal corporation, and that he is an officer thereof, to-wit, the Mayor thereof; that the foregoing answer is true of his own knowledge, except as to those matters and things therein stated on information and belief, and as to those he believed it to be true.

JOHN R. HIGGINS, *Mayor.*

Sworn to and subscribed before me this the 28th day of February, 1910.

[SEAL.] R. J. SMITH,
Notary Public.

My commission expires January 3, 1912.

Filed February 28, 1910.

JAS. R. HATCH,
Clerk Superior Court.

Whereupon the plaintiff comes and replies to the answer of the defendant, as follows:

22 *Reply to Answer.*

NORTH CAROLINA,
Wayne County:

In the Superior Court, November Term, 1910.

(Title of Cause.)

The plaintiff, in reply to the answer of the defendant, alleges:

1st. That the defendant ought not to be heard to deny that the Atlantic Coast Line Railroad Company now owns all the right, title and interest of the Wilmington & Raleigh Railroad in and to the right of way herein above referred to, as is alleged in paragraph seven of the complaint and denied in paragraph seven of the answer, by reason of the fact, that in a case heretofore pending in the Superior Court of Wayne County wherein the present defendant, the

City of Goldsboro, was plaintiff, and the present plaintiff, the Atlantic Coast Line Railroad Company, was the defendant, in the facts agreed therein it was agreed "that the Wilmington & Raleigh Railroad Company was duly incorporated by the General Assembly of North Carolina at its session of 1833; that thereafter the name of the said company was by an act of the General Assembly changed to the Wilmington & Weldon Railroad Company, and thereafter the name of the Wilmington & Weldon Railroad Company was changed to the Atlantic Coast Line Railroad Company, and that the said last named company has succeeded to all the rights, powers and privileges of the said Wilmington & Raleigh Railroad Company and the said Wilmington & Weldon Railroad Company and is now the owner of and exercising the same"; and further that by reason of a deed executed by Arnold Borden to the Wilmington & Raleigh Railroad Company, "the Wilmington & Raleigh Railroad Company had constructed its line of railway over, along and through what is known as East and West Center streets in the city of Goldsboro before the incorporation of said town, and begun about the year 1838 to
23 operate trains over the same, and it and the Wilmington & Weldon Railroad Company, and the Atlantic Coast Line Railroad Company have continued to use and operate on said lands since the said date to the present time"; and that the defendant, the City of Goldsboro, levied an assessment on said right of way known as East and West Center streets as the property of the plaintiff, the Atlantic Coast Line Railroad Company.

In the judgment rendered in said cause at the — term of said court it was adjudged among other things that "it does not appear from the facts agreed that the plaintiff (the City of Goldsboro) is the owner of the streets described in the pleadings. The only title which appears to be in the plaintiff is set out in the fourth paragraph of the facts agreed, and it is not therein stated how long the plaintiff has been using the streets in controversy nor whether such use is hostile to the defendant. The court is unable to see anything which distinguishes this case from a long line of decisions to the fact that the use and occupancy of the right of way of the railroad company is in subordination to the rights of the railroad in its said right of way."

The plaintiffs set- up said proceedings and agreed facts and the agreed facts and the judgment of the court as an estoppel against the defendant, denying that the plaintiff is not the owner of all the right, title and interest of the Wilmington & Raleigh Railroad in and to the right of way described in the pleadings, as it alleged in paragraph seven of the complaint.

The plaintiff denies so much of the seventh paragraph of the answer as alleges "that the plaintiff by constructing and operating a different line of railway in, around, by and through the city of Goldsboro than the one in said paragraph referred to, has abandoned the said original right of way, and is no longer entitled to use the same for any purpose whatever."

In this connection the plaintiffs allege that it is true that it
24 has built a belt line around the city of Goldsboro, for that the same was not built for the purpose or with the effect of

abandoning its original right of way through the city of Goldsboro, but was built solely for the purpose of complying with an order of the Corporation Commission made upon a petition of the Board of Aldermen of the city of Goldsboro, compelling the plaintiff, the Southern Railway Company and the Norfolk & Southern Railroad Company to establish a union passenger station, and for the purpose of reaching the said station.

2d. That the defendant ought not be heard to deny the allegation in paragraph thirteen of the complaint by reason of the fact that in a case recently pending in the Superior Court wherein the present defendant the City of Goldsboro was plaintiff, and the present plaintiff, the Atlantic Coast Line Railroad Company was the defendant, the plaintiff alleged in its complaint that the defendant therein, the Atlantic Coast Line Railroad Company, was the owner of what is known as East and West Center streets and that an assessment of $690.03 had been laid upon the said Atlantic Coast Line Railroad Company as the owner of said streets to cover one-third of the costs of the pavement of the same by the city of Goldsboro, and further for the reason that in the facts agreed in said case it was agreed that the plaintiff, the Atlantic Coast Line Railroad Company, was the owner of said street and it was so adjudged in the judgment of the court in said proceeding, and said proceeding, facts agreed and judgment are hereby pleaded as an estoppel against the defendant herein, denying the said allegation in paragraph thirteen of the complaint.

3rd. That in reply to so much of the allegation of the defendant in paragraph twenty of its answer as purports to be a quotation from the answer of the plaintiff in the case of Charles Dewey and others v. Atlantic Coast Line Railroad Company, the defendant alleges that said statement was made with reference to the moving of the passenger trains and the through freights of the plaintiff, and of the trains, both passenger, through freights and local freights of the
25 Southern and the passenger trains of the Norfolk & Southern through said city, and the said answer was intended for no other purpose than for that action, and with reference to the facts therein contained, and has no application whatever to the present contention when only the freight trains of the plaintiff and the shifting engines of the Southern and the Norfolk & Southern use the said right of way.

4th. That so much of the twenty-second par-graph of the defendant's answer as alleges "that by the relocation of its right of way, had and maintained on its own application, plaintiff, in law, thereby abandoned and lost all right in and to the use of any part of East and West Center streets for its railway line is denied," and the plaintiff in this connection alleges that said belt line built around the city of Goldsboro was done in compliance with an order of the Corporation Commission of the State of North Carolina, on a petition of the defe-dant commanding the plaintiff, the Southern Railway Company and the Norfolk & Southern Railway Company to construct a union passenger station in or near said city, and said line was built for the purpose of reaching said station, and with no

purpose whatever of abandoning the original right of way through the city of Goldsboro.

5th. The plaintiff in reply to the further defense of the defendant, alleges, that on July 5th, 1905, a resolution was passed by the Board of Aldermen of the city of Goldsboro, asking the Corporation Commission of the State of North Carolina, to take speedy action to cause the erection of a proper passenger station in said city; that in accordance with said petition the Corporation Commission met in the city of Goldsboro on January 4th, 1906, and after due notice to all the parties the Corporation Commission heard said petition and ordered and authorized the erection of said passenger station and in compliance with and in obedience to said order the said railroads proceeded to construct the union passenger station on its present site which is beyond the limits of the city of Goldsboro, and the plaintiff constructed a belt line around the city of Goldsboro for the purpose of reaching said station, and not for the purpose of abandoning its original right of way.

26

Wherefore the plaintiff demands judgment as in its complaint.

GEO. B. ELLIOTT,
GEO. M. ROSE,
W. C. MUNROE,
Attorneys for Plaintiff.

J. L. Royall, being duly sworn says, that he is local agent of the Atlantic Coast Line Railroad Company at Goldsboro, North Carolina; that the above reply is true of his own knowledge except as to those matters therein stated on information and belief and as to those he believes it to be true.

J. L. ROYALL.

Sworn to and subscribed before me this the — day of December, 1910.

JAS. R. HATCH,
Clerk of the Superior Court of Wayne County, N. C.

Summons for Relief.

WAYNE COUNTY:

In the Superior Court.

(Title of Cause.)

The State of North Carolina to the Sheriff of Wayne County, Greeting:

You are hereby commanded to summon Atlantic Coast Line Railroad Company, the defendant above named, if it be found within your county, to be and appear before the Judge of our Superior Court at a court to be held for the county of Wayne at the court house in Goldsboro on the fifth Monday after the first Monday of March, it being the 8th day of April, 1907, and answer the com-

plaint, which will be deposited in the office of the Clerk of
27 the Superior Court of said county within the first three days of said term, and let the said defendant take notice that if it fail to answer the complaint within the time required by law, the plaintiff will apply to the court for the relief demanded in the complaint.

Hereof fail not, and of this summons make due return.

Given under my hand and seal of said court, this 22d day of March, 1907.

JAS. R. HATCH,
Clerk Superior Court.

Returnable to April Term, 1907, of the Superior Court for Wayne County.

Received March 22, 1907. Served March 22, 1907, by reading summons and delivering copy to J. W. Price, agent A. C. L. R. R. Co., at Goldsboro, N. C.

E. A. STEVENS,
Sheriff Wayne County,
J. LANGHORNE BARHAM,
Plaintiff's Attorney.

Complaint.

NORTH CAROLINA,
Wayne County:

In the Superior Court, April Term, 1907.

(Title of Cause.)

The plaintiff for its complaint alleges:

1. That the city of Goldsboro is a municipal corporation duly chartered and organized.

2. That the defendant Atlantic Coast Line Railroad Company owns and operates a line of railroad through said city of Goldsboro.

3. That East Center and West Center streets of the city of Goldsboro adjoin the roadbed of the defendant company and run parallel with said roadbed from the beginning to the end of said streets.

4. That Section 61 of the charter of said City of Goldsboro provides, "That the city of Goldsboro may establish a system
28 of sewerage, may pave its streets and sidewalks, may establish a system of waterworks * * *."

5. That Section 74 of the charter of said city of Goldsboro provides, "That the city of Goldsboro shall have power in its discretion, to assess owners of land abutting on streets paved by said city, with an amount not to exceed one-third of the actual cost of such paving in front of such abutting land; and said city shall have like power of assessing not exceeding one-third of the actual cost of any sewer in front of such abutting land, but the cost of common outlets shall

not be so assessed, and the cost thereof as herein provided for, may be assessed upon such abutting property and added to the taxes on the same; and collected in the same manner that other taxes, or assessments are collected."

6. That on April 6, 1903, the Board of Aldermen of said city of Goldsboro passed the following resolution: "On motion of Alderman Royall, the charges to be made against the owners of property abutting on streets that have been and are being and are hereafter to be paved, under the contract with M. C. Markley, was fixed at one-third (1-3) of the cost of same, as provided in Section 74 of the charter of the city."

7. That thereupon, the plaintiff in conformity with and under the power and authority given it in its charter, caused several of its streets to be paved; among them being, East Center street between Chestnut street south, and Ash street north, and taxed the defendant with one-third of the actual cost of such paving, which amounted to six hundred and ninety dollars and three cents ($690.03).

8. That the plaintiff has demanded of the defendant the payment of the said sum of $690.03 which demand has been refused.

9. That upon information and belief the plaintiff alleges that by the reason of the paving of said East Center street the defendant company has been benefited in an amount greatly in excess of the sum assessed against it by the city of Goldsboro.

29 Wherefore, the plaintiff demands judgment against the defendant for the sum of Six Hundred and Ninety Dollars and Three Cents, with interest on same from April, 1903, and for the cost of this action.

J. LANGHORNE BARHAM,
Attorney for Plaintiff.

NORTH CAROLINA,
Wayne County:

George E. Hood, being duly sworn, says that he is the Mayor of the city of Goldsboro, the plaintiff corporation; that the foregoing complaint is true of his own knowledge, except as to those matters therein stated on information and belief, and as to those matters he believes it to be true.

JAS. R. HATCH, *C. S. C.*

NORTH CAROLINA,
Wayne County:

Superior Court, April Term, 1907.

(Title of Cause.)

The defendant answering the complaint herein says:

1st. That paragraph one thereof is admitted.

2d. That paragraph two thereof is admitted.

3d. That paragraph three thereof is denied, and the defendant alleges in connection that said streets were laid out in their entire

length and breadth upon lands owned by the defendant in fee simple, the said city having used the same since its organization with the tacit assent of the defendant, and the said city, at the most, having only an easement for passage to and from over said land. That no such street as East Center street, and no such street as West Center street, were ever admitted to be laid out by the municipality of Goldsboro, nor are any such streets in existence; the right of way of the defendant through the entire length of the city of Goldsboro, north and south, has been since the organization of the town of Goldsboro, known as Center street and colloquially that part
30 of it lying to the east of the center line of the right of way aforesaid, has been called East Center street, and that part lying west of the line West Center street.

4th. That paragraph four thereof is admitted.

5th. That paragraph five thereof is admitted.

6th. That paragraph six thereof is admitted.

7th. That paragraph seven thereof is denied; but it is admitted in connection therewith that the said plaintiff caused several of its streets to be paved. It is also admitted that it caused that part of defendant's right of way in said city lying between Chestnut street south and Ash street north, known as East Center street, to be paved.

If plaintiff undertook to tax this defendant with one-third of the actual costs of paving said part of said right of way of the defendant known as East Center street between Chestnut and Ash streets, the same was done without any notice to this defendant whatever, and it never had any opportunity to be heard in the premises, and so it avers that to permit the plaintiff to collect out of it the said alleged assessment would be to deprive it of its property without due process of law in violation of the 14th Amendment of the Constitution of the United States, which the defendant hereby pleads and relys upon in bar of said recovery.

8th. That paragraph eight thereof is admitted.

9th. That paragraph nine thereof is denied.

Wherefore defendant prays to be hence dismissed and to recover of plaintiff the costs of this action.

——— ———,
Attorneys for Defendant.

John F. Divine, being duly sworn, says that the defendant is a corporation, and that he is an officer thereof, to-wit, the Assistant General Superintendent, that the foregoing answer is true of his own knowledge, except as to those matters and things therein stated on information and belief, and as to those he believes it to be true.

JOHN F. DIVINE.

31 Sworn to and subscribed before me this 25th day of March, 1908.

M. B. RAHM, *N. P.*

My commission expires May 21, 1909.

Agreed Statement of Facts.

NORTH CAROLINA,
Wayne County:

Superior Court, June Term, 1908.

(Title of Cause.)

The plaintiff and the defendant hereby agree upon the following statement of facts to be passed upon by the court:

1st. That the Wilmington & Raleigh Railroad Company was duly incorporated by the General Assembly of North Carolina at its session of 1833; that thereafter the name of the said company was by act of the General Assembly changed to the Wilmington & Weldon Railroad Company, and thereafter the name of the Wilmington & Weldon Railroad Company was changed to the Atlantic Coast Line Railroad Company, and that said last named company has succeeded to all the rights, powers and privileges of the said Wilmington & Raleigh Railroad Company and said Wilmington & Weldon Railroad Company, and is now the owner and exercising the same.

2d. That the said charter of the Wilmington & Raleigh Railroad Company contains the following sections:

"SECTION 13. Be it further enacted, That it shall and may be lawful for the said company to purchase and hold, and take by gift or devise all lands and estate and property of any kind, to be by them used or improved, or resold and conveyed: Provided, the said property and estate are faithfully applied for the purpose and objects hereby intended to be effected; and in general meetings and at other times, the president and directors for the time being are hereby authorized and empowered, by themselves or their agents to exercise all the powers herein granted, and all such other powers and authority for the effectual prosecution of the undertaking hereby in-
32 tended to be effected, and for the management of the affairs of the corporation not hereinbefore granted, as may be necessary to carry into effect the object of this grant."

"SECTION 14. Be it further enacted, That if the president and directors aforesaid cannot agree with the owners of land through which it may be necessary to make the said railroad, as to the terms upon which the said railroad shall be opened through the same, then it shall and may be lawful for the president and directors to file a petition in the name of the company in the court of pleas and quarter sessions of the county wherein the land lies, under the same rules and regulations as are now prescribed by law for laying off public roads in said county; and upon the filing of said petition, the same proceedings shall be had as in cases of laying off public roads, excepting these, to-wit: the president and directors, by themselves or their agent shall mark out the course of the road, and it may be wide enough to give the company sixty-five feet clear on each side of the base of the road; and the jury, in assessing the damage, shall likewise

assess the value of the benefits resulting to the owners of the land for the constructing of the road through or near the lands of the owner or owners of that which is marked out for the road, and the jury shall be sworn to act accordingly; and when the jury shall have assessed the damages to the owner or owners of the land through which the road is laid off, and also the value of the benefits resulting as aforesaid, it shall be returned to court, and final judgment entered accordingly for the damages assessed, which, however, shall be extinguished pro tanto by the value of the benefits resulting to the owner; and it shall be lawful for the company or the president and directors to pay the difference; if there be any, into the office of the clerk for the use of the owner or owners, or his, her or their guardian, as the case may be, and thereupon, and also if there be no damage due, enter upon the land laid off, and construct their road or other improvements thereon, to make all necessary excavations and
33 embankments, and to hold the said land to their own use and benefit; and in all things have the same power over the said land so laid off as though they owned the fee simple therein: Provided that nothing in this act contained shall be so construed as to give power to said company to lay off said road through the yard, garden or burial ground, appurtenant to the mansion house of any person whatsoever, without the consent of the owner thereof, or his, her or their guardian as the case may be."

"SEC. 15. Be it further enacted, That the written consent of any owner or proprietor of any lands through which the said road is to be constructed showing his, her, or their agreement to the same, shall be valid and effectual to give the same power and authority over the lands covered by the road, and sixty-five feet on each side thereof as aforesaid, as if the same had been conveyed by a deed of bargain and sale, or condemned upon petition as aforesaid; and although the said lands may belong to a feme covert, the signing of such assent by her and her husband, shall be as conclusive and effectual against her as though she had been a feme sole, subject, however, to the proviso contained in the preceding section; and this assent shall be binding and conclusive, though it be signed before the company is formed." That under the provisions of the said charter the president and directors of the said company in the year 1837 located the said road in Wayne County, North Carolina, through the lands of Arnold Borden, and on the 2d day of December, 1837, the said Arnold Borden executed and delivered to the Wilmington & Raleigh Railroad Company a deed dated on said day which is in words and figures as follows, to-wit:

WAYNESBORO, *Dec.* 2*d*, 1837.

For and in consideration of the sum of $400.00 to me in hand paid by the president and directors of the Wilmington & Raleigh Railroad Company, the receipt of which is hereby acknowledged, I do hereby grant to said company the right of way through
34 my lands and plantation adjoining the lands of Sampson Lane, Lemuel Whitfield and others agreeable to the terms described in the charter of said company, that is to say, I grant to

said company the roadway and 65 feet on each side thereof as said road is now located through my lands, to them the Wilmington & Raleigh Railroad Company, and their successors forever. And I do also covenant with said company that I have the legal right to convey the said premises, and that I will warrant and defend the right and the above described roadway to the said company against the legal claim or claims of all persons whatsoever.

In witness whereof I have hereunto set my hand and seal the day and year first above written.

A. BORDEN. [SEAL.]

Witness:
ALEX. M'RAE.

Duly proven and registered February 7, 1838.

Which deed was duly proven and registered in the office of the Register of Deeds of Wayne County, North Carolina, in Book 17, page 381, at February Term, 1838, of the county court of Wayne County. That thereafter the Wilmington & Raleigh Railroad Company built its road over and across the said lands of the said Arnold Borden in Wayne County, North Carolina, and began about the year 1838, to operate trains over the same, and it and the Wilmington & Weldon Railroad Company and the Atlantic Coast Line Railroad Company have continuously used and operated on said land since the said date to the present time.

3d. That in the year 1844 the town of Goldsboro was chartered by the General Assembly of North Carolina and duly organized, and that the name of the said town has since been changed by act of the General Assembly and it is now known as the city of Goldsboro.

4th. That after the organization of the said town and while the Wilmington & Raleigh Railroad was using and operating its railway over the lands hereinbefore referred to, the town of Goldsboro, under authority of the General Assembly, laid out streets in said city, and among others, it laid out East Center street on the east side of the said railroad track, which has since been used as such street without objection on the part of the defendant and its predecessors. That the said East Center street extends from the center of the main track of the defendant, and has always extended from the center of said main track, sixty-five feet eastwardly and is the same width from Chestnut street south to Ash street north; that the whole of the said East Center street as the same was located and has been and is now in use, is located on the lands described in the deed from Arnold Borden to the Wilmington & Raleigh Railroad Company.

5th. That the General Assembly of North Carolina, at its session of 1901, enacted Chapter 397 Private Acts of North Carolina, in reference to the city of Goldsboro, and that Section 61 thereof is in the following language:

"That the city of Goldsboro may establish a system of sewerage, may pave its streets and sidewalks, may establish a system of waterworks, or may purchase the system now in operation in said city;

may establish a gas, electric or other plant for furnishing lights, or may purchase the electric light plant now in operation in said city, may build and own a city hall and market house, and may own or operate any or all of these improvements, and may make other public improvements, and may apportion the cost of the same equally among the inhabitants; and, for the purpose of providing such improvements, may, as and when the Board of Aldermen may determine, issue its bonds from time to time, to any amount not exceeding in the aggregate the sum of two hundred thousand dollars ($200,000), of such denominations and in such proportions as the Board of Aldermen may deem advisable, bearing interest from the date thereof at a rate not exceeding six per centum per annum, with interest coupons attached payable half yearly at such times and at such place or places as may be deemed advisable by said Board,
36 said bonds to be of such form and tenor and transferable in such way and the principle thereof payable or redeemable at such time or times, not exceeding fifty (50) years from the date thereof, and at such place or places as the Board of Aldermen may determine; said bonds may be issued for any of said purposes or for two or more or for all."

That Section 74 is in the following language: "That the city of Goldsboro shall have power, in its discretion to assess owners of land abutting on streets paved by said city with an amount not to exceed one-third of the actual cost of such paving in front of such abutting land, and said city shall have like power of assessing not exceeding one-third of the actual cost of any sewer in front of such abutting land, but the cost of common outlets shall not be so assessed, and the cost thereof as herein provided for may be assessed upon such abutting property and added to the taxes on the same, and collected in the same manner that other taxes or assessments are collected."

That under Section 61 an election was held for contracting a debt and issuing bonds for the purpose of paving the streets of the city in the sum of $20,000; that a majority of the qualified voters voted for the issue of said bonds and the said election was duly carried and the said bonds issued and the money therefor to be used for paving the streets of the city.

6th. That on the 6th day of April, 1903, the Board of Aldermen of the city of Goldsboro passed a resolution that the city macadamize certain of the streets of the said city, among others East Center street from Chestnut street south to Ash street north under contract with M. C. Markley, and that the charges to be made against the owners of the property abutting on the streets that have been made and are being and are hereafter to be paved under the contract with M. C. Markley be fixed at one-third of the costs of the same as provided in Section 74 of the charter of the city.

7th. That thereupon, the plaintiff, purporting to act under
37 the said acts of the General Assembly and the said resolution caused several of its streets to be paved under contract with said Markley, among them being East Center street between Chestnut street south and Ash street north, and assessed the defendant with one-third of the actual cost of such paving which amounted

to $690.03, that the plaintiff demanded said sum of the defendant, dant with one-third of the actual cost of such paving which amounted same has ever been paid. That the defendant paid for macadmizing that part of its right of way between its rails lying between Chestnut street south and Walnut street north, and from Walnut street south to Ash street north the track of the defendant was not macadmized between the rails.

8th. That carloads of freight are unloaded from the cars of the defendant on East Center street north of Walnut street, and that drays and wagons taking freight from said cars approach the same and take the freight on said East Center street, and that the mail car of the Norfolk & Southern which by permission of the defendant has a track on said street, receives its mail therefrom north of Walnut street. That the depot and baggage room of the defendant are also situated on said streets, but are not on right of way of the defendant. By reason thereof the paving of said street has incidentally benefited the defendant.

9th. That the defendant has no land on East or West Center street between Chestnut and Ash streets except the land conveyed to the Wilmington & Raleigh Railroad Company by Arnold Borden, the east side of which is known as East Center street and the west side of which is known as West Center street, the tracks of the defendant lying between the said East Center street and the said West Center street.

J. LANGHORNE BARHAM,
Attorney for Plaintiff.
AYCOCK & DANIELS,
Attorneys for Defendant.

38 *Judgment.*

NORTH CAROLINA,
Wayne County:

In the Superior Court.

(Title of Cause.)

This cause coming on to be heard upon the agreed statement of facts presented to the court by the attorneys representing both plaintiff and defendant, and having been heard after full argument, the court is of opinion and doth therefore consider, order and adjudge that the plaintiff take nothing by its said action and the defendant go hence without day and recover its cost. From the facts agreed it does not appear to this court that the defendant is the owner of land abutting on a street paved by the city of Goldsboro within the purview of Section 74 of the charter of said city. It does not appear from the facts agreed that the plaintiff is the owner of the streets described in the pleadings. The only title which appears to be in the plaintiff is set out in the fourth paragraph of the facts agreed, and it is not therein stated how long the plaintiff has been

using the streets in controversy without objections, nor whether such user is hostile to the defendant. The court is unable to see anything which distinguishes this case from the long line of decisions to the effect that the use and occupancy of a right of way of a railroad company is in subordination to the rights of the railroad in its said right of way.

C. C. LYON,
Judge Presiding.

NORTH CAROLINA,
Wayne County:

In the Superior Court, August Term, 1909.

(Title of Cause.)

Judgment having been rendered in the above entitled cause in favor of defendant, and notice of appeal through mistake
39 entered on the record, and the plaintiff withdrawing his notice of appeal, it is ordered that this cause be dismissed.

W. R. ALLEN, *Judge.*
J. L. BARHAM,
Attorney for Plaintiff.

NORTH CAROLINA,
Wayne County:

I, Jas. R. Hatch, Clerk Superior Court, do hereby certify that the foregoing are true and correct copies of the original papers filed in this office in the case of "City of Goldsboro v. A. C. L. R. R. Co.," and of the judgments in said case as appears on the records in this office.

Witness my hand and official seal, this 22d day of December, 1910.

[SEAL.] JAS. R. HATCH,
Clerk Superior Court Wayne County, N. C.

Deed.

WAYNESBORO, *Dec.* 2, 1837.

For and in consideration of the just and full sum of four hundred dollars to me in hand paid by the president and directors of the Wilmington & Raleigh Railroad Company, the receipt of which is hereby acknowledged, I do hereby grant to said company the right of way through my lands and plantation adjoining the lands of Sampson Lane, Lemuel Whitfield and others, agreeable to the term prescribed in the charter of said company, that is to say, I grant to said company the roadway and sixty-five feet on each side thereof, as said road is now located, through my lands to them, the said Wilmington & Raleigh Railroad Company, and their successors forever. And I do hereby covenant with said company that I have the legal right to convey said premises and that I will warrant and

defend the right to the above described roadway to the said company against the legal claim or claims of all persons whatsoever. In witness whereof, I have hereunto set my hand and seal, the day and year first above written.

A. BORDEN [SEAL.]

Witness:
ALEX M'RAE.

40 Wayne County, February Term, 1838.

Then was the within deed of sale from Arnold Borden to the president and directors of the Wilmington & Raleigh Railroad Company duly proved in open court by the oath of Alex McRae, a subscribing witness, and let it be registered.

M. A. GREEN, *Clerk.*

NORTH CAROLINA,
Wayne County.

I hereby certify that the foregoing deed from Arnold Borden to the Wilmington & Raleigh Railroad Company is a true copy from the records of my office. Witness my hand and seal of said office at Goldsboro, this December 23, 1910.

[SEAL.]

L. H. REAVES,
Register of Deeds.

Deed.

This indenture made the 4th day of March, in the year of our Lord one thousand eight hundred and twenty-nine. Between Patrick F. Boyette, of the County of Wayne and State of North Carolina, on the one part and Arnold Borden, of Waynesboro and State aforesaid, on the other part, witnesseth, that for and in consideration of the sum of Two Hundred and Fifty Dollars to him the said Patrick Boyette in hand paid by the said Arnold Borden at or before the sealing and delivering of these presents the receipt whereof he doth hereby acknowledge and therefore doth release, acquit and discharge the said Arnold Borden, his executors and administrators by these presents he the said Patrick F. Boyette granted, bargained, sold, aliened and confirmed and by these presents doth grant, bargain, sell, alien and confirm unto the said Arnold Borden and his heirs a certain piece or parcel of land situate, lying and being in the county aforesaid about one mile from the town of Waynesboro on the road leading to New Bern and bounded as follows: Beginning at two ashes on the run of the Marsh branch and runs with
41 Uriah Langston's line south 89 west 52 poles to a sourwood in James Rhodes line, thence with his line south 10 east 26 1-2 poles to two red oaks his corner, then south 85 west 44 poles to pine down and red oak stump, then south 75 west 36 poles to a small post oak and red oak in Whitfield's line, then with his line south 29 east 14 poles to a small blazed red oak his corner, then his other line south 61, west 139 poles to a stake the other corner, then

with his other line north 26 west 45 poles to a stake on the Waynesboro road, then along the road south 75 west 43 poles to a sassafras stake on the side of the road, then with Rhodes' line south 39 east 46 poles to a larger pine and white oak his corner, then south 28 east 12 1-2 poles to a sweet gum, then west 2 poles to a stake, then south 119 poles to a stake by a gum down, then south 89 east 111 poles to a small sweet gum, then south 40 east 54 poles to a persimmon bush, then south 73 east 60 poles to a white oak then south 63 east 40 poles to a stake on the road, then along the New Bern road north 9 east 58 poles, then north 30 east 16 poles to the Mitchell patent line, then with said line south 80 west 55 to a hickory, then north 98 poles to a stake on the run of the Marsh branch, then on up the run of said Marsh branch as it meanders to the first station containing two hundred and eighty-eight acres (reference being had to a plot of the above land made by Britton Hood and bearing date the 27th day of April, 1826, for the correctness of the within boundaries, etc., and all houses, buildings, orchard, ways, water courses, profits, commodities, hereditaments and appurtenances whatsoever to the premises hereby granted or any part thereof belonging or in anywise appertaining and the reversion and reversions, remainder and remainders vest issues and profits thereof and also all the estate, right, title, interest, use, trust, property, claim, and demand, whatsoever of him the said Patrick F. Boyette, for his heirs, executors or administrators, doth covenant, promise and grant to and with the said Arnold Borden, his heirs and assigns by these presents, that the said Patrick F. Boyette, now at this time of sealing
42 and delivering these presents is seized of a good, sure and perfect indefeasible estate of inheritance in fee simple of and in the premises hereby bargained and sold and that he has good power and lawful and absolute authority to grant and convey the same to the said Arnold Borden in manner and form aforesaid and that the said premises now are and so forever hereafter shall remain and be free and clear of and from all former gifts, grants, bargains, sales, dower rights and title of lower judgments, executions, title troubles and encumbrances whatsoever, made, done, committed or suffered by the said Patrick F. Boyette and his heirs all and singular the premises hereby bargained and sold with the appurtenances unto the said Arnold Borden, his heirs and assigns against him the said Patrick F. Boyette and his heirs and all and every person or persons whatsoever shall warrant and forever defend by these presents.

In witness whereof the said Patrick F. Boyette hath hereunto set his hand and seal the day and year first above written.

PATRICK BOYETTE.

Witness:

P. HOOKS,
ISAAC HILL,
BRITTON HOOD.

Wayne County, November Term, 1829.

Then was the deed of sale from Patrick F. Boyette to Arnold Borden duly proved in open court by the oath of Phillip Hooks, a subscribing witness, and let it be registered.

P. HOOKS, *Clerk.*

NORTH CAROLINA,
Wayne County:

I hereby certify that the foregoing and attached deed from Patrick F. Boyette to Arnold Borden, is a true copy from the records of my office.

Witness my hand and the seal of said office, at Goldsboro, this December 21, 1910.

[SEAL.]

L. H. REAVES,
Register of Deeds.

43 *Deed.*

This indenture made the 1st January and in the year of our Lord one thousand eight hundred and thirty-four, between James Rhodes, of the County of Wayne and State of North Carolina, on the one part, and Arnold Borden, of the same county and State aforesaid, on the other part. Witnesseth: That I the said James Rhodes, have for and in consideration of the sum of one hundred and sixty-eight dollars and eighty-eight cents current money to me in hand paid, have bargained and sold and do by these presents bargain, sell, convey and confirm unto the said Arnold Borden, his heirs and assigns one certain piece or parcel of land lying and being in the County of Wayne on the north side of Neuse River and bounded as follows: Beginning at a stake on the New Bern road leading to Hooks' bridge in said Borden's line and runs with his line south 75 west 18 1-2 poles to a lightwood stake in Lem H. Whitfield's line, then with his line north 29 west 67 poles to a small red oak his corner, then with his other line north 12 1-2 east 70 poles to a stake on the said New Bern road, then along and down said road south 17 east 127 1-4 poles to the first station, containing 16 7-8 (sixteen and seven-eighths) acres, and being all the land that the said Rhodes owned on the south side of said New Bern road, together with all and singular the privileges and appurtenances thereunto belonging or in anywise appertaining. To have and to hold unto Arnold Borden, his heirs and assigns forever and the said James Rhodes for himself and his heirs, doth covenant and agree with the said Arnold Borden and his heirs to warrant and forever defend the said tract of land situated as aforesaid unto the said Arnold Borden, his heirs and assigns forever against any lawful claims from all and every person whatsoever.

44 In witness whereof, I, the said James Rhodes, have hereunto set my hand and seal, the day and date first above written.

JAMES RHODES, [SEAL.]

Signed, sealed and delivered in presence of
I. LANGSTON,
ROBERT LANGSTON.

Wayne County, February Term, 1841.

Then was the within deed of sale from James Rhodes to Arnold Borden duly proved in open court by the oath of Ira Langston, a subscribing witness, and ordered to be registered.

JNO. A. GREEN, *Clerk.*

NORTH CAROLINA,
Wayne County:

I hereby certify that the foregoing deed from James Rhodes to Arnold Borden is a true copy from the records of my office.

Witness my hand and the seal of said office at Goldsboro, this December 21, 1910.

[SEAL.] L. R. REAVES,
Register of Deeds.

Deed.

This indenture made the 24th day of February in the year of our Lord one thousand eight hundred and three, between Ludwick Alford in the State of North Carolina and County of Wayne, of the one part, planter, and Uriah Langston, of the County and State aforesaid, of the other part.

Witnesseth: That I, the said Ludwick Alford, for and in consideration of the sum of three hundred and ninety-eight dollars and sixty-five cents to me in hand paid by Uriah Langston before the signing and sealing of these presents the receipt — is hereby acknowledged have bargained, sold, signed and set over to the said Uriah Langston, his heirs and assigns forever a certain tract or par-
45 cel of land situate lying and being in the county aforesaid on the north side of Neuse River and west side of Stony Creek and bounded as follows, viz: Beginning at a sweet gum in the long branch, in my patent line and runs with said line north 20 east 48 poles to a pine, then east 83 poles to a pine, then north 24 poles to a pine, then north 15 east 106 poles to a pine, then west 92 poles to a sweet gum, then north 66 west 136 to a stake, then south 142 poles to a post oak on the side of the road, then down said road to a pine on the run of said branch, then down the run of said branch as it meanders to the first station, containing one hundred and eighty-seven acres, it being part of a patent granted to John Langston bearing — the 13th day of October, 1783, to have and to hold the above said land and premises together with all and singular the profits, privileges, benefits and appurtenances thereunto belonging or in any wise appertaining to him the said Uriah Langstin, his heirs and assigns forever free and clear from all encumbrances whatsoever and I, the said Ludwick Alford, doth bind myself, my heirs and assigns to warrant and forever defend the above mentioned land and premises from or against the lawful claim or claims of any manner of person or persons whatsoever unto the said Uriah Lang-

ston, his heirs and assigns forever, in witness whereof I have hereunto set my hand and seal the day and year above written.

L. ALFORD. [SEAL.]

Signed, sealed and delivered in presence of
BRITTON HOOD.
JOS. B. BOYETTE.

NORTH CAROLINA,
Wayne County:

May Court, 1803.

I hereby certify that the foregoing deed from Ludwick Alford to Uriah Langston is a true copy from the records of my office.

Witness my hand and the seal of said office, at Goldsboro this December 21, 1910.

[SEAL.]

L. H. REAVES,
Register of Deeds.

46 *Deed.*

This indenture made and entered into this twentieth day of April in the year one thousand eight hundred and thirty-nine, by and between Wright Langston, of the County of Wayne and State of North Carolina, of the one part, and Willie Hall, of the same County and State of the other part.

Witnesseth: That I, the said Wright Langston, for and in consideration of the sum of four hundred and sixty dollars to me in hand paid by the said Willie Hall at and before the ensealing and delivering of these presents the receipt and payment whereof is hereby acknowledged and from the further payment whereof I, the said Wright Langston, will forever acquit and discharge the said Willie Hall, his heirs, executors and administrators, I have given, granted, bargained and sold, aliened, released, conveyed and confirmed and will by these presents give, grant, bargain, sell alien, release, enfeoff and confirm unto him the said Willie Hall, his heirs and assigns forever a certain piece or parcel of land situate lying and being in the County of Wayne and State of North Carolina on the west side of the Wilmington & Raleigh Railroad, joining the lands of the heirs of Robert Langston, Leml. H. Whitfield, James Rhodes, and bounded as follows, viz: Beginning at a stake Ollin Coor's corner in the condemnation of the aforesaid railroad and runs west 12 poles and 4 yards to a stake, then with his Coor's other line north 19 east to a stake in the line of the heirs of Robert Langston, deceased, then with said line west 53 poles to a pine in Whitfield's line, then with his line south 8 west 93 1-2 poles to a stake James Rhodes corner, then with his Rhodes line about south 55 east to the line of the condemnation of the railroad, then with said line of the aforesaid railroad to the first station, containing twenty-six acres, be the same more or less.

To have and to hold unto the said Willie Hall, his heirs and assigns forever the aforesaid bargained land and premises with all and singular the appurtenances and privileges thereunto be-
47 longing or in any way appertaining thereto and I, the said Wright Langston, will by these presents warrant and forever defend the right and title of said land to him, the said Willis Hall, his heirs and assigns forever clear from the lawful claim or claims of any and every person or persons whatsoever.

In witness whereof, I, the said Wright Langston, have hereunto set my hand and affixed my seal the day and year first above written.

his
WRIGHT x LANGSTON.
mark

Signed, sealed and delivered in presence of

W. K. LANE.
KEDAR RAIFORD.

Wayne County, May Term, 1841.

Then was the above deed of sale from Wright Langston to Willis Hall duly proved in open court by the oath of W. K. Lane, the subscribing witness. Let it be registered.

JNO. A. GREEN, *Clerk.*

NORTH CAROLINA,
Wayne County:

I hereby certify that the foregoing deed from Wright Langston to Willis Hall is a true copy from the records of my office.

Witness my hand and the seal of said office, at Goldsboro this December 21, 1910.

[SEAL.] L. H. REAVES.
Register of Deeds.

Will of Uriah Langston.

In the name of God, Amen, I, Uriah Langston, of the County of Wayne and State of North Carolina, do this day make and publish this to be my last will and testament in manner and form following being of a sound and disposing mind and memory. First, I give my beloved wife, Mary Langston, one bed and furniture, one mare called Pigeon, two cows and calves, her choice two ewes
48 and lambs, two sows and pigs, her choice three hundred dollars in silver.

I give to Equilla Langston five dollars. I give to my grandson, William Langston, five dollars. I give the land where my son Elijah Langston lived to be sold by my executors when my grandson Elisha Langston comes in here or when he arrives of age, he, the said Elisha Langston, to have three hundred and fifty dollars of the money arising from the sale, the balance of the money to be

equally divided between my two granddaughters Elenor and Elizabeth Langston. I give my son Asa Langston all the land on the east side of the Marshy branch that's above the long pond branch but not to have possession of the cleared land in the lifetime of my wife.

I give to my son Henry Langston all the lands on the west side of said branch except the land I bought of Isaac Hill to a small branch between Henry Langston and Robert Langston, the branch near where the old path crosses the road from here to the place I bought of Isaac Hill. I give my son Ira Langston the land where Ira Langston lives and the land called the Bunn land and he is to pay to Robert Langston fifty dollars. I give to my son Uriah Langston the land where he lives. I give to my son Robert Langston the land where he lives from the branch named between him and Henry to the branch on this side of Robert's house and from the branch at the road near Robert's house from a stake stuck at the branch and road and run an west course till it strikes Lemuel H. Whitfield's line and I also give the land I bought of Isaac Hill to be equally divided between my two sons Henry Langston and Robert Langston. I give to my son Wright Langston all my lands that I have not before given away, but not to have possession of the land on the east side of the Marshy branch as long as my wife lives all the lands I have given to my children I give to them and their heirs forever. I give to Wright Langston one horse called John, and bed and furniture, one bridle and saddle, one cow and
49 calf. I give to my daughter Sally Howell four hundred and fifty dollars, one hundred to be paid out of the first money that's raised, the balance to be paid as soon as the money can be collected after the death of my wife. I give to my daughter Polly Pike four hundred and fifty dollars, one hundred to be paid out of the first money raised, the balance to be paid as soon as the money can be collected after the death of my wife. I give to my daughter Martha Langston five hundred dollars, one hundred dollars to be paid out of the first money raised, the balance to be paid as soon after the death of my wife as the money can be collected and one bed and furniture, one cow and calf or the worth of it. I give to my daughter Lydia Langston five hundred dollars, one hundred to be paid out of the first money and one bed and furniture, one cow and calf or money to buy one that is raised, the balance to be paid as soon after the death of my wife as the money can be collected. The legacies I have left in money are not to draw interest so they are paid at the times mentioned the horse I give to my son Wright if he should die by altering for him to have fifty dollars paid him in money. I leave my lot and house in Waynesborough to be sold at my decease — my executors and what is in them only the store house to be excepted till the first of October the term I have rent it for and the money arising from the sale to go to paying of the legacies. I give my son Asa Langston the horse called Star and one bed and furniture.

I give my grandson George Langston if he stays with my wife as long as she lives one hundred dollars one bed and furniture a part

of the money to go to schooling him. I lend to my beloved wife all the balance of my property that I have not given away during her natural life or widowhood, at her death to be sold by my executors and after paying of the legacies the balance to be equally divided among all my heirs except my son Elijah Langston's children. I wish for my executors to sell my two negroes Tom and Tenor
50 together. I wish for my two daughters Martha and Lydia to have with their beds all the bed clothing that they call theirs at my decease. I wish for my executors to pay over to my daughters all the money that is left after paying my just debts and the legacies that is to be paid them for it to go toward paying them the balance of their legacy that is to be paid them at my wife's death. I wish lot and house to be sold on a credit of six months. Lastly I nominate my two beloved sons Ira Langston and Uriah Langston my whole and sole executors to this my last will and testament revoking all other wills made by me heretofore, ratifying this and no other to be my last will and testament. Given under my hand and seal this the 26th day of February, 1835.

URIAH (his X mark) LANGSTON. [SEAL.]

Signed in the presence of
WM. THOMPSON.
WM. (his X mark) HEAD.

NORTH CAROLINA,
Wayne County:

I, Jas. R. Hatch, Clerk of the Superior Court, do hereby certify that the foregoing is a true and correct copy of the will of Uriah Langston, as appears on the records in my office.

Witness my hand and official seal, this the 15th day of December, 1910.

[SEAL.] JAS. R. HATCH,
Clerk Superior Court, Wayne County, N. C.

Condemnation Proceedings.

STATE OF NORTH CAROLINA,
Wayne County:

Court of Pleas and Quarter Session, Nov. Term, 1837.

To the Worshipful the Justices of said Court:—The petition
51 of the Wilmington & Raleigh Railroad Company humbly complaining showeth unto your worships that the road which they are now constructing will pass through the lands of Uriah Langston of this county. They represent unto your worships that they have not been able to come to any understanding or agreement with the owner U. Langston as to the terms upon which they may construct the road over his lands they therefore pray that this court will cause the sheriff to summon a jury of twelve lawful men

to go upon the route that may be pointed out by the president and directors or by their agent and say what damage the owner will sustain by the constructing of the road allowing or condemning sixty-five feet on each side of the base. The jury also taking into consideration the value of the benefit resulting and that may result to the owner from the construction of the road and that the jury make a return to court under hand and seal of their proceedings they first having been duly sworn and your petitioners pray that this court will take all and such other steps touching the premises as may seem necessary and your petitioners as in duty bound will ever pray.

W. B. WRIGHT,
Sol. pro. Pet.

STATE OF NORTH CAROLINA,
Wayne County:

Court of Pleas and Quarter Session, May Term, 1838.

To the Worshipful the Justices of said Court:

The amended petition of the Wilmington & Raleigh Railroad Company humbly complain- and showeth unto your worships that the road which they are now constructing will pass through the lands of Wright Langston, Robert Langston, and Henry Langston, of this county; they represent unto your worships that they have not been able to come to any understanding or agreement with the said Wright, Robert and Henry as to the terms upon which they may construct their road over their lands, they therefore pray that this court will cause the sheriff to summon a jury of twelve lawful men to go upon the routes that may be pointed out by the
52 president and directors or by their agent and say what damages the owners will sustain by the constructing of the road allowing or condemning sixty-five feet on each side of the base of said road. The jury also taking into consideration the value of the benefit resulting and that may result to the owners from the construction of the road, and that the jury make a return to court under hand and seal, of their proceedings, they first having been duly sworn and your petitioners pray that this court will take all and such other steps touching the premises as may seem necessary and your petitioners as in duty bound will ever pray, etc.

W. B. WRIGHT,
Sol. pro. Pet.

Service of this petition acknowledged by us 24th of May, 1838.

R. LANGSTON.
his
WRIGHT x LANGSTON.
mark
J. A. GREEN.
his
HENRY x LANGSTON.
mark
WRIGHT, Attorney.

State of North Carolina to the Sheriff of Wayne County, Greeting:

You are hereby commanded to summon a jury of good and lawful men to go upon the route of the Wilmington & Raleigh Railroad as now located by the engineer of the said road through the lands of Henry Langston, Wright Langston and Robert Langston and after having been duly sworn say what damage the owners will sustain by the construction of said road after taking into consideration the benefits that may result to said owners by the construction of said road and your proceedings return to our next court
53 to be held for said county at the court house in Waynesboro on the third Monday of August next. Herein fail not and have you then and there this writ. Witness, Jno. A. Green, Clerk of our said court at office the third Monday of May, A. D., 1838.

JNO. A. GREEN, *Clerk.*

Executed on Henry Langston and Robert Langston.

W. THOMPSON, *Sheriff.*

Writ for Jury to Assess Damage.

J. Gardner, Jos. Pate, B. Herring, D. Vinson, W. Howell, M. Thompson, J. H. Sasser, I. Wiggs, W. H. Buffalo, Levi Bunn, Jesse Applewhite, W. Hill.

W. THOMPSON, *Sheriff.*

STATE OF NORTH CAROLINA,
Wayne County:

We, the undersigned jurors, having been summoned and sworn by William Thompson, Sheriff, in and for the aforesaid county to go upon the lands of Henry and Robert Langston on the road of the Wilmington & Raleigh Railroad, as located by the engineer of said road to say what damage they the said Henry and Robert Langston will sustain by the construction of said road, allowing or condemning 65 feet on each side of the base of said road, also taking into consideration the benefits that may result said owners by the construction of said road we, the said jurors, hereby say the said Henry Langston is damaged exclusive of the advantages seventy-five dollars; and the said Robert Langston exclusive as above is damaged one hundred and forty-six and one-fourth dollars.

Given under our hands and seals this 14th August, 1838.

JOSIAH GARDNER.	[SEAL.]
WILLIAM THOMPSON.	[SEAL.]
JOS. H. SASSER.	[SEAL.]
JOSEPH PATE.	[SEAL.]
ISAIAH WIGGS.	[SEAL.]
BENEJAH HERRING.	[SEAL.]
W. H. BUFFALO.	[SEAL.]
DANIEL VINSON.	[SEAL.]
LEVI BUNN.	[SEAL.]
WOODARD HOWELL.	[SEAL.]
JESSE APPLEWHITE.	[SEAL.]
WEBB HILL.	[SEAL.]

Witness:

W. THOMPSON, *Sheriff.*

54 The Clerk of the county court will please make the order out for the amount of damages assessed by the jury in my favor against the Wilmington & Raleigh Railroad Company for running through my land to Arnold Borden to whom I hereby transfer the full amount the jury gave me to him for value of him received this 21st August, 1838.

his
HENRY x LANGSTON.
mark

Attest:
WM. K. LANE.

In the "Minutes of Wayne County Court," including the year 1838, at August Term of Court, 1838, is the following entry.

STATE OF NORTH CAROLINA,
Wayne County:

At a Court of Pleas and Quarter Sessions began and held for the county aforesaid at the court house in Waynesboro on the third Monday in August, A. D., 1838, it being the 20th day of said month.

Present: Gab'l. Sherard, Jno. C. Slocumb, Ichabod Pearson and Jno. Cox, Esqrs.

Report Returned and Confirmed.

OFFICERS OF W. & R. RAILROAD
v.
ROBERT, WRIGHT and HENRY LANGSTON, Heirs of U. LANGSTON.

And on the Trial Docket of August Term of Wayne county court, for the year 1838, is the following entry:

Petition to Condemn Land.

(Title of Cause.)

Service accepted. Report made and confirmed. Judgment that the plaintiff pay the defendant the sum of $75 to Henry Langston and $146.25 to Robert Langston the actual damage assessed. (fifa iss'd.)

55 And on the Execution Docket including the year 1838, in the executions made "returnable to November Term, 1838," if the following entry:

(Title of Cause.)

Received Rob. Langston judgment, $146.25.
I. LANGSTON, *Exer.*

Satisfied Henry Langston judgment, paid, see ex. Costs paid in office.
W. THOMPSON, *Sheriff.*

NORTH CAROLINA,
Wayne County:

I, Jas. R. Hatch, Clerk Superior Court, do hereby certify that the foregoing is a true and correct copy of the orginal proceedings as filed in this office of the case of "Wilmington & Raleigh Railroad Company v. Robert, Wright and Henry Langston," also correct entries in the matter of the said case, from each separate docket as mentioned in the foregoing copy.

And I do hereby further certify that the original execution in the above entitled proceedings, can not, after diligent search, be found in this office, nor can the "Appearance Docket" for the year 1838, be found, in this office, after the same diligent search.

Witness my hand and official seal, this December 22, 1910.

[SEAL.] JAS. R. HATCH,
Clerk Superior Court Wayne County, N. C.

Plaintiff's Affidavits.

Affidavit of W. C. Munroe.

NORTH CAROLINA,
Wayne County:

In the Superior Court.)

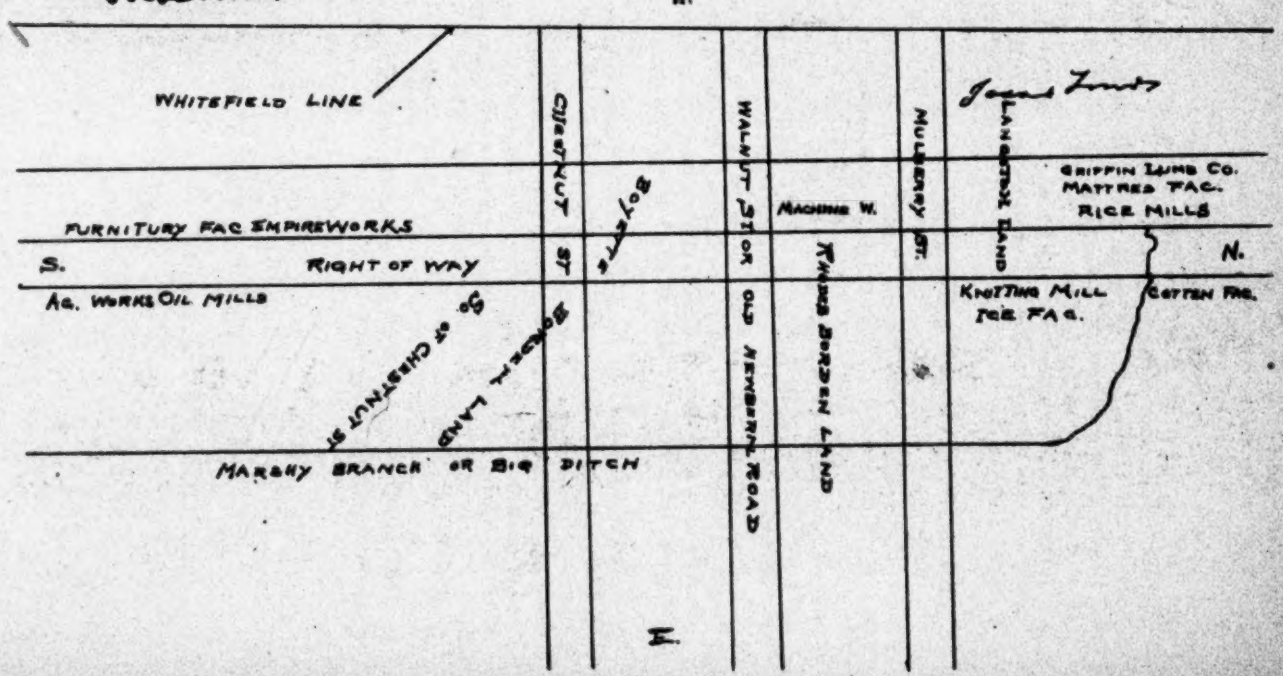
(Title of Cause.)

W. C. Munroe, being duly sworn says, that he knows but two persons who were living in this immediate community at
56 about the time the Wilmington & Raleigh Railroad Company was constructed and these are Mr. E. B. Borden and Col. J. A. Washington. I went to Mr. Borden and asked him what he knew of the location of the lands on which said road was constructed through the city, especially of that tract owned by his father and he said he knew nothing as he was a young boy and was off at school the most of the time. While Col. Washington is a year or two younger than Mr. Borden, he has had much better advantages of informing himself by having been in the Register's Office for forty years or more. He has from time to time given me much valuable information as to old landmarks and the present sites of the original tracts of lands. I have therefore confidently expected to get him to get time to give me the necessary affidavit, after his examination of the deeds I had copied, and from which anyone familiar with deeds and the locations that are made known might give an approximately correct statement of the original tracts over which said road runs through the city.

Fifteen or twenty years ago I did considerable business examining titles for the Penn Mutual Life Insurance Company and the Old Dominion Building and Loan Association. Both these corporations

No 112
RR Co
to
Goldsboro
$57.00

COAST LINE
CITY GOLDSBORO.



required the title to be traced back to the State in every instance if possible. I had therefore had to familiarize myself with local surroundings as they originally were, and trace the title to the people I knew to be in possession back to the original owners. The promtnent landmarks from which and to which the lines all run are Marshy Branch (or Big Ditch) on the eastern side of the railroad, and the Sassers and Whitfield land on the west side of the railroad. This land belonged to Jas. Sasser and the southern portion is in the division of his land in 1824 given to his daughter, the wife of L. H. Whitfield. This land is now in the possession of the Bordens, his descendants. Until very recently the other portion was in possession of the Sassers, Mrs. McKee, of Raleigh, and Mrs. H. P. Dortch, of this place.

57 What is Walnut street now used to be, so all old people say, the New Bern road. I think from what I learn from old people that it deflected somewhat to the southeast side and somewhat to the south on the west side of the railroad. I herewith file a map which I think is substantially correct from which it will be seen that all south of New Bern road, now Walnut street, is the land Boyette sold to Arnold Borden, and that from Walnut street, or New Bern road, to Mulberry street was land sold by Rhodes to Arnold Borden. All of which he sold to the Wilmington & Raleigh Railroad.

It will be seen that all the land on the south of Mulberry belonged to the Langston and we file condemnation proceedings as to this and a deed from Wright Langston to Willis Hall in which he recognizes the condemnation.

I have founded Rhodes' lands on the south by Walnut street, or New Bern road, because he speaks of that as Borden's line, and by Mulberry street on the north because in a deed to Jno. A. Green, James Rhodes speaks of the northern boundary as being Langston's land. I know well where this Green property was situated, it having until recently been occupied by his children until part was sold as postoffice, and part to H. Weil & Bros.

W. C. MUNROE.

Subscribed and sworn to before me, this December 26th, 1910.

JAS. R. HATCH, *C. S. C.*

(Here follows map marked p. 57*a*.)

58 NORTH CAROLINA,
Wayne County.

Superior Court.

(Title of Cause.)

The undersigned being duly sworn each for himself says, that he has been a resident of the city of Goldsboro for quite a number of years; that he is acquainted with the location of the tracks of the Atlantic Coast Line Railroad Company of the Atlantic & North Carolina Railroad Company, and of the North Carolina Railroad Company, on the right of way of the Atlantic Coast Line Railroad Company in what is known as East and West Center streets; that from Chestnut street to the southern limit of the city these tracks lie in a cut from one to seven or eight feet deep, and that from Walnut street to the northern portion of the city the track is and always has been elevated above the surface of the rest of the right of way from two to three to ten inches except at the crossing; that that portion of the said streets occupied by the roadbeds from Chestnut street to the southern limits of the city and from Walnut street to the northern limits of the city has never been used for travel except at the crossings. That in the attiant's opinion the moving of trains to and fro over said tracks through the city of Goldsboro is very beneficial to the commercial interests of the city, most of the large industries that give life and activity to the business interests of the city are located on said tracks, and nearly if not all of them are in the corporate limits of the city.

That in the opinion of affiant the right of the merchants to have the railroad deliver heavy merchandise from the cars within the city limits is of great advantage to the business interests of the city and does not materially detract from the pleasures and interests of the citizens of said city; that thereby merchandise is more cheaply and expeditiously delivered at the warehouses of the merchants, which adds greatly to the commercial interests of the city; that the benefits accruing to the merchants from said custom greatly
59 overbalances any possible inconvenience that may arise to the general public. That so far as he is informed no person has been injured nor property destroyed within twenty years by the moving of trains through the streets of the city of Goldsboro.

J. W. Thompson, C. Dewey, L. C. Lane, H. A. Pike, A. H. Edgerton, J. T. Ginn, C. H. Moore, M. J. Best, L. L. Hamilton, W. H. Best, John Slaughter, H. E. King, Graves J. Smith, Geo. Stanley, J. A. Toler, R. E. Pipkin, G. S. Dewey, C. C. Smith, C. M. Grantham, T. A. Dewey, Baker, Bizzell & Co., N. E. Bradford, G. W. Baker, The City Pharmacy, R. I. Thornton, W. V. Williams, H. L. Bizzell, H. B. Parker, Jr., B. G. Thompson, C. D. Taylor, W. T. Rose, J. Bruce Thompson, G. A. Norwood, M. K. Moore, B. F. Best, Brown Bros., The Record, Goldsboro Grocery Co., G. W. Brown, Thos. H. Holmes, Chas. A. Brown, W. T. Harrison, J. B. Edgerton, Andrews & Waddell, A. Byrd, F. S. Waddell, F. P. Latham, J. M.

Grantham, H. G. Grady, M. H. Hornady, W. H. Overman, Raymond Grantham, J. L. Pipkin.

Subscribed before me this 23d day of December, 1910.

HUGH HUMPHREY, *J. P.*

Affidavit of D. W. Cross.

STATE OF NORTH CAROLINA,
County of Wayne:

(Title of Cause.)

D. W. Cross being duly sworn says, that he is engineer of construction of the plaintiff Railroad Company, and has had 15 years experience in estimating the cost of grading, and the construction of railroads; that he is informed and believes that on the 1st day of November, 1909, the city of Goldsboro, among other ordinances, passed by it in relation to railroads, adopted this ordinance:

SEC. 5. That all railroads or railway companies, owning tracks on East and West Center streets, between Walnut and Vine streets, in said city of Goldsboro, are hereby required to lower said track so as to make the same conform to the grade line of said streets; and said tracks to be filled in between the rails the grade line of said streets being as follows:

Beginning at the present grade line, corner of Walnut and East and West Center streets, to be lowered six inches to the corner of Mulberry and East and West Center street, ten inches to the corner of Ash and East and West Center streets, 18 inches to the corner of Oak and East and West Center streets, and 18 inches to the corner of Vine and East and West Center streets.

SEC. 6. That any railroad or railway company, failing or refusing to comply with the above ordinance, shall be guilty of a misdemeanor, and fined $50.00, and each and every day said tracks are allowed to remain shall constitute a separate offense, and that this ordinance shall go into effect ninety days from November 1st, 1909.

That he has made an estimate of the cost to the Railroad Company of a compliance with this ordinance, and that the same without being of any material benefit to the city of Goldsboro, would cost the Atlantic Coast Line Railroad Company the sum of $4,300, and that the change of grade of the tracks as set out in said ordinance, will in effect change the entire grade of the railroad's line through the city of Goldsboro.

That he is informed that the city of Goldsboro was built and the houses erected along the line of the Railroad Company, long after said Railroad Company had acquired its right of way across the same, and that an enforcement of the same would be of great disadvantage to said Railroad Company, and would seriously interfere with its franchise in said city.

D. W. CROSS.

Sworn to and subscribed before me, this 14th day of January, 1911.

[SEAL.] ROBERT SCOTT,
Notary Public.

61 STATE OF NORTH CAROLINA,
Wayne County:

(Title of Cause.)

J. A. Fountain being duly sworn says, that he is District Superintendent of the Atlantic Coast Line Railroad Company, plaintiff in this action, and that he is familiar with the operation of trains and the conduct of the business of said company, in the city of Goldsboro; that he is informed and believes that the city of Goldsboro, on the 1st day of November, 1909, passed, among others, the following ordinance:

SECTION 1. That it shall be unlawful for any railroad or railway company to operate or run any train or local freight train, or any passenger train, through the city of Goldsboro, on East and West Center street, at a rate exceeding (4) miles an hour, and that said railroad or railway company, are required to have a flagman to proceed fifty (50) feet in front of each and every train or local freight train, or passenger train, to warn persons of the approach of said train. Any railroad or railway company violating this ordinance shall be subject to a fine of $50.00 for each and every offense.

SEC. 2. That the shifting limits of East and West Center streets shall be on the south of Spruce street to the city limits, and north of Ash street to the city limits.

SEC. 3. That it shall be unlawful for any railroad or railway company to do any shifting on East and West Center streets between Spruce and Ash streets at any other time than between the hours of 6:30 to 8:30 a. m., and from 4:30 to 6:30 p. m. Any railroad or railway company violating this ordinance, shall be subject to a fine of $50.00 for each offense.

SEC. 4. That it shall be unlawful for any railroad or railway company to place any cars or allow said cars to stand, for a longer period of time than five minutes, at any point on East and West Center streets, between Spruce and Ash streets. Any railroad or railway company violating this ordinance shall be subject to a fine of $50.00 for each offense.

62 That he is informed and believes that all of said property known as East and West Center streets, belongs to the plaintiff company, as its right of way, and the enforcement of said ordinance would very seriously interfere with the operation of the business of the company, and would greatly interfere with the convenience of its patrons along said right of way. That it has sidetracks leading from the street into the yards of customers along said road, and that it is necessary at other times than those stated in the ordinance, to use said street for the purpose of delivering freight to said yards. That it has been the custom of the company ever since its line of

road was built, to use its right of way between streets at the northern end of said city, and also at the southern end, for the purpose of delivering freight to customers whose business houses were located on either side of said right of way, and that said delivery has been done without interfering with the traffic along its right of way. That the travel along said right of way, he is informed and believes, and the use of the same is subject to the rights of the plaintiff, and if these ordinances are enforced and penalties placed upon the company, it will amount to an almost abandonment of the use of its right of way through the city of Goldsboro. That the hours of 6:30 to 8:30 a. m. is before business is usually opened in the city, and the hours of 4:30 to 8:30 is after the heaviest business of the day is done, and that the enforcement of this ordinance, as stated, would greatly interfere with the rights of the company along its rights of way, and would be a serious interference with the business of the company, and would retard very seriously the enjoyment of the franchises which the company owns along its right of way.

J. A. FOUNTAIN.

Sworn to and subscribed before me this 11th day of January, 1911.

[SEAL.]

ROBERT SCOTT,
Notary Public.

63 The plaintiff introduced Sections 14 and 15 of the charter of the Wilmington & Raleigh Railroad Company passed at the Session of 1833, which are as follows:

"Sec. 14. Be it further enacted, That if the president and directors aforesaid can not agree with the owners of land through which it may be necessary to make the said railroad, as to the terms upon which the said railroad shall be opened through the same, then it shall and may be lawful for the president and directors to file a petition, in the name of the company, in the court of pleas and quarter sessions of the county wherein the land lies, under the same rules and regulations as are now prescribed by law for laying off public roads in said county, and upon the filing of said petition, the same proceedings shall be had as in cases of laying off public roads, excepting these, to-wit The president and directors, by themselves or by their agent, shall mark out the course of the road, and it may be wide enough to give the company sixty-five feet clear on each side of the base of the road; and the jury, in assessing the damage, shall likewise assess the value of the benefits resulting to the owners of the land for the constructing of the road through or near the lands of the owner or owners of that which is marked out for the road, and the jury shall be sworn to act accordingly, and when the jury shall have assessed the damages to the owner or owners of the land through which the road is laid off, and also the value of the benefit resulting as aforesaid, it shall be returned to court, and final judgment entered accordingly for the damages assessed, which, however, shall be extinguished pro tanto by the value of the benefits resulting to the owner; and it shall be lawful for the company or the

president and directors to pay the difference, if there be any, into the office of the clerk for the use of the owner or owners, or his, her or their guardian, as the case may be, and thereupon, and also, if there be no damage due, enter upon the land laid off, and construct their road or other improvements thereon, to make all necessary excavations or embankments, and to hold the said land to their
64 own use and benefit; and in all things have the same power over the said land so laid off as though they owned the fee simple therein: Provided, that nothing in this act contained shall be so construed as to give power to said company to lay off said road through the yard, garden or burial ground, appurtenant to the mansion house of any person whatsoever, without the consent of the owner thereof, or his, her or their guardian, as the case may be.

"Sec. 15. Be it further enacted. That the written consent of any owner or owners or proprietor of any lands through which the said road is to be constructed showing his, her or their agreement to the same, shall be valid and effectual to give the same power and authority over the lands covered by the road, and sixty-five feet on each side thereof, as aforesaid, as if the same had been conveyed by a deed of bargain and sale, or condemned upon petition as aforesaid; and although the said lands may belong to a feme covert, the signing of such assent by her and her husband shall be as conclusive and effectual against her as though she had been a feme sole, subject however, to the proviso contained in the preceding section; and this assent shall be binding and conclusive, though it be signed before the company is formed."

The plaintiff introduces Section 37 of the defendant's charter which provides for the condemnation of property for the use of streets, and which provides that in case the city and the owner of the property to be appropriated can not agree on the price, that either party shall select an arbitrator with power of said arbitrator to select an umpire whose decision as to damages shall be conclusive.

The plaintiff introduces Section 55 of the charter of the defendant which gives to the defendant the right to regulate the speed of trains through the city and which is the only section with reference to any power given to the defendant over railroads.

The plaintiff introduces the petition of the Board of Aldermen of the city of Goldsboro asking for, and the order of the
65 Corporation Commission of North Carolina requiring the plaintiff, the Southern Railway and the Norfolk & Southern Railway to erect a union passenger station off their lines and outside of the limits of the city of Goldsboro, at the place where it is located.

Defendants Affidavits.

NORTH CAROLINA,
Wayne County:

Superior Court, November Term, 1909.

(Title of Cause.)

C. J. Griswold, C. E. Stanley, J. E. Peterson, Albert E. Clarke, R. A. Creech and R. J. Smith, each being duly sworn says, that he is a resident and citizen of Goldsboro, North Carolina; that at the time of the passage of the ordinances mentioned in the complaint the standing of cars loaded with freight and the unloading of the same on East Center street between Walnut street and Mulberry street obstructed the said street and rendered the movement along the same difficult and dangerous and constituted an ugly and unnecessary prospect in the heart of the business portion of the city; that instead of running its freight trains around the city of Goldsboro upon its right of way, the defendant continued to run its freight trains, frequently of such length as to extend half the length of the street, through the streets of the city, and the defendant and the Southern Railway ran its shifting engines loaded with timber and freight of various sorts up and down its track through the said city at any and all hours; that the crossings on Center street were frequently blocked and obstructed, and the citizens inconvenienced, and in attempting to pass the crossings frequently in danger; that a large number of school children of the community live on the western side of the railroad tracks, and are compelled in attending school to cross and recross the same in order to reach the
66 school buildings which are situate to the east of said tracks and on William street in said city; that the conduct of the railroad companies, as herein stated, tends to inconvenience and to endanger the lives and property of the inhabitants of said city, and will continue to so inconvenience and endanger the same unless such conduct is controlled and restrained in the manner proposed in the said ordinances or in some other way.

C. J. Griswold, C. E. Stanley, J. E. Paterson, Albert E. Clarke, R. A. Creech, R. J. Smith.

Sworn to and subscribed before me, this the 25th day of February, 1910.

[SEAL.] EDGAR H. BAIN,
Notary Public.

NORTH CAROLINA,
Wayne County:

In the Superior Court.

(Title of Cause.)

L. H. Castex, J. W. Winslow and W. T. Hollowell, being duly sworn depose and say, that they have for many years been residents

of the city of Goldsboro; that East and West Center, Elm, Pine, Spruce, Chestnut, Walnut, Mulberry, Ash, Oak, Beach, Vine and Holly streets are streets in said city; that East and West Center streets run parallel with and adjoin the tracks of the plaintiff; that Elm, Pine, Spruce, Chestnut, Walnut, Mulberry, Ash, Oak, Beech, Vine and Holly streets cross the tracks of the plaintiffs; that all the aforesaid streets have been used as such continuously in the position and description as above stated by the defendant for a period of over forty years.

L. H. CASTEX.
J. W. WINSLOW.
W. T. HOLLOWELL.

Sworn to and subscribed before me this the 14th day of January, 1911.

[SEAL.] C. E. STANLEY,
Notary Public.

67 NORTH CAROLINA,
Wayne County:

In the Superior Court, November Term, 1909.

(Title of Cause.)

M. N. Epstein, Solomon Isaacs, Joseph Edwards and K. E. Bizzell, each being duly sworn says, that he is a citizen and resident of Goldsboro, N. C., and engaged in the mercantile business on East Center street between Walnut and Mulberry street; that the track of the plaintiff and the other railroads running through said street pass in front of his place of business, and that the distance from the eastern spur track nearest the sidewalk on East Center street is 29 feet and one inch as measured by Mr. B. M. Denmark, chief of police of the city, that this spur track was at the time of the passage of the ordinances referred to in the complaint used by the defendants for the purpose of placing thereon freight cars loaded with meat, grain and other freights to be delivered to consignees in the city of Goldsboro; that frequently as many as three or four cars so loaded would be upon the said spur track at the same time and would remain there for several days; that in order to unload the said cars, drays and wagons were backed to the same on the east side of the street, and the freight removed from the cars into said wagons and drays which extended into the said streets towards the sidewalk, and there were frequently at the same time a number of the said drays and wagons loading from said cars by reason of which nearly the entire street between the said cars and the sidewalk was frequently so obstructed that passage along the said street in vehicles was sometimes impossible, nearly always difficult, and involved danger to persons so passing, that there are on the street hereinbefore mentioned a number of dry goods stores, fruit stores, general merchandise stores and a bakery, with which large numbers of the citizens do business, and that when the said cars were on the said track and were being unloaded, access

to the said stores by means of vehicles was difficult and dangerous, and that this danger was increased by the movement of freight trains and shifting engines over the tracks lying west of the
68 said spur track; that not only were the citizens inconvenienced and exposed to danger by reason of the facts hereinbefore recited, but that the business of the merchants and dealers on East Center street within the limits mentioned was seriously interefered with, and that the permitting of said freight cars to remain upon the track and to be unloaded upon the drays and wagons standing in the street and obstructing the movement of vehicles along the same in the very heart of the city made the said street and neighborhood unsightly and constituted a nuisance. That there was and is no necessity that heavy freights should be unloaded from cars upon said track, and that the unloading of the same served the convenience of only the railroad company and a few merchants doing business in said city to the great inconvenience of the citizens generally. That the trains and shifting engines were frequently run along and through the said city blocking the crossings, filling the street with noise, dust and smoke and otherwise inconveniencing the inhabitants of said town, and particularly the persons engaged in business along the said streets; that the graded schools of the said city are situated in the eastern part of the city, and that a large number of the children attending these said schools have to cross the said tracks in going to and returning from the schools, and are in danger from the shifting engines and trains passing over the various crossings extending from one end of the city to the other.

M. N. EPSTEIN.
SOLOMON ISAACS.
JOSEPH EDWARDS.
K. E. BIZZELL.

Subscribed and sworn to before me this the 25th day of February, 1910.

[SEAL.] EDGAR H. BAIN,
Notary Public.

NORTH CAROLINA,
Wayne County:

Superior Court.

(Title of Cause.)

R. A. Colvin, being duly sworn, deposes and says, that he is a civil engineer by profession, a graduate of the University of
69 Texas, and has for some years been in the employment of the city of Goldsboro as city engineer; that as such city engineer, and by direction of the Board of Aldermen of the city of Goldsboro, he surveyed and established grades for the purpose of paving the streets of the said city, and that a number of the said streets so surveyed and on which the grades were so established have been paved by the city of Goldsboro in accordance with the survey

and establishment of the said grades; that among the streets which affiant surveyed and established the grade are the following: East and West Center streets which extend north and south through the center of the said city (and on which are situate the tracks of the A. C. L. Railroad Co., Southern Railroad Co. and the Norfolk & Southern Railroad Co.), Elm street, Pine street, Spruce street, Chestnut street, Ash street, Oak street, Vine street, Beech street and Holly street which run east and west crossing the said East and West Center streets and the said railroad tracks; that the said streets are graded according to the usual methods and in such a way as to provide for the flow of water along said streets and for the passing of pedestrians and vehicles over and across the said East and West Center streets; that after establishing the grades of the said streets affiant reported the same to the Board of Aldermen of said city and said report was adopted, and it was ordered that the work of paving said streets conform to the grades so established; that a profile of said grades and specifications of street paving and grading reported by affiant to the said Board of Aldermen and adopted by said Board, is hereto attached, marked "A" and made part hereof; that a map made by affiant of East and West Center streets and intersecting streets of a said city showing location of the same and of the railroad tracks of the said railroads, and which is substantially correct, is hereto attached, marked "B" and made part hereof; that the city has paved three blocks on West Center street from Ash to Chestnut inclusive with bithulithic, and had theretofore paved three blocks on East Center street with macadam extending from Chest-
70 nut to Ash streets inclusive; that the said city has since the establishment of said grades paved Chestnut street and Mulberry street on both sides of East and West Center streets and crossing said West Center and East Center streets with bithulithic pavement, and had theretofore paved Walnut street and East and West Center street across said East and West Center street with macadam; that the paving already done by the city is preliminary to the further paving of said East and West Center streets and the said streets intersecting the same to be carried forward upon the grade so established; that at the point where Beach street crosses the said railroad tracks the said tracks are elevated 18 inches above the grade established for Beech street; that at the point where Vine street crosses the said railroad tracks the said tracks are elevated 17 inches above the grade established for said Vine street and over said East and West Center streets, and where the said tracks are crossed by Oak street the tracks are elevated 18 inches above the grade established for Oak street, and where the said tracks are crossed by Ash street the tracks are elevated 18 inches above the grade established for Ash street, and where the said tracks are crossed by Mulberry street the tracks are elevated 6 inches above the grade established for Mulberry street; that the said railroad tracks where they are crossed by Walnut, Chestnut and Holly streets conform to the established grade; that the said tracks where they are crossed by Spruce street are 2 feet 4 inches below the established grade, and at Pine street are 4 feet below the established grade, and at Elm street are 6 feet and 3

inches below the established grade; that the crossings over the said railway tracks at Elm, Pine and Spruce streets are inconvenient, dangerous and almost impassable for traffic over and across the said streets and that it is impracticable for the city to remedy the said inconvenience and dangers; that the crossings over the said tracks at Mulberry, Ash, Oak, Vine and Beech streets are very bad on
71 account of the elevation of the said tracks above the established grade, particularly on account of the inconvenience and dangers suffered by vehicles in crossing the same; that it is impossible for the city in any way to remedy this condition while the said tracks remain upon the said streets at their present elevation; that it is entirely practicable for the plaintiff and the railway companies using the said tracks to lower the same from Walnut street to Holly street and conform the same to the said established grade without injury or inconvenience in the operation of trains over the same and at little expense; that affiant has made a careful estimate of the costs of so lowering the said tracks to conform with the said grade, and is of opinion that the expense to the plaintiff and the said railroad companies could not exceed the sum of $3,000.00; that the lowering of the said tracks would work no hardship on the plaintiff by reason of the change of grade nor render the operation of its trains more difficult, inconvenient or expensive; that while the tracks of the said railroad companies remain in their present condition and do not conform to the grade established by the defendant the flow of surface water is obstructed and ponded on the streets of the city, and stands for a considerable length of time in the cut to the south of Chestnut street where the same becomes stagnant and injurious to the health of the citizens of said city.

R. A. COLVIN.

NORTH CAROLINA,
Wayne County:

Superior Court, November Term, 1909.

W. H. Waters being duly sworn says, that he has been for the past year or more engaged in driving a hack in the city of Goldsboro, and that his business takes him into all sections of the city; that prior to the enactment of the ordinances mentioned in the complaint herein the defendant was in the habit of placing on the spur track on East Center street between Mulberry and Walnut streets cars loaded with heavy groceries and grain and permitting
72 the same to be unloaded into drays and wagons standing in East Center street, and that for long periods of time the passage of vehicles along the said street was rendered difficult, sometimes impossible and frequently dangerous; that freight trains and shifting engines constantly run along the road of the defendant and shifting engines along the road of the Southern at all hours making the crossings in the said town along Center street, of which there are ten, dangerous to life and limb;

that frequently the said crossings at which the defendant had placed no gates or guards, or other protection for persons passing over the same was so blocked by the freight trains of the defendant either passing through the town or standing still therein, that for considerable periods of time it was impossible to cross, and persons driving vehicles were often compelled to ride several squares in order to cross from one side of the railroad track to the other.

W. H. WATERS.

Subscribed and sworn to before me this the 25th day of February, 1910.

EDGAR H. BAIN, *N. P.*

NORTH CAROLINA,
Wayne County:

Superior Court.

(Title of Cause.)

J. A. Washington, being duly sworn, says that he has been for many years a citizen and resident of the city of Goldsboro, and for more than twenty years Deputy Register of Deeds of the county of Wayne, in which the said city is situate; that East and West Centre streets of said city, from their intersection with Chestnut Street to their intersection with Ash Street, are and have been for many years used exclusively for business purposes, and many of the most important business establishments, including the principal hotel and one of the most important manufacturing establishments of said city, are situate upon the said streets within the said limits; that from Chestnut Street, south, to Elm Street the said East Center and West Centre streets are occupied on both sides by resi-
73 dences; that West Centre Street, from Ash Sstreet to the property of the Southern Railroad Company, is occupied by residences, and that East Centre Street, north, from Ash Street to the property of the Norfolk-Southern Railroad Company, is occupied by the Goldsboro Knitting Mills, a manufacturing company, by the Goldsboro Ice Plant and by residences; that affiant has been familiar for many years, by reason of his official position, with the conveyances made for lots fronting on said East and West Centre streets, many of the most valuable of which have changed ownership during his continuance in office, and that the description of the lots conveyed in deeds uniformly calls for the line of said streets and never for the right of way of the plaintiff that the streets in said city known as East and West Centre have been used, to affiant's knowledge, as streets of the said city for a period of more than sixty years, and have been occupied, kept in order, maintained and improved by the said city as a part of its system of streets.

J. A. WASHINGTON.

Sworn to and subscribed before me, this the 27th day of December, 1910.

[SEAL.] C. E. STANLEY,
Notary Public.

Extracts from Ordinance.

The defendant introduced the following section of the ordinances of the city of Goldsboro, to-wit:

"SECTION 5. Whatever is dangerous to human life or health, whatever renders the air or food or water, or other drink, unwholesome, and whatever building, erection, or part of cellar thereof, is overcrowded or not provided with adequate means of ingress or egress, or not sufficiently supported, ventilated, drained, cleaned or lighted, are declared to be nuisances, and to be illegal; and every person having aided in creating or contributing to the same, or who may support, continue or retain any of them shall be deemed
74 guilty of a violation of this ordinance, and also be liable for the expense of the abatement and remedy thereof."

The defendant introduced the following sections of the charter:

"SECTION 22. That any violation of a city ordinance shall be a misdemeanor, and shall be punished by a fine of not more than fifty dollars, or imprisonment of not more than thirty days. And no preliminary affidavit shall be necessary to give the mayor final jurisdiction over the offenses against the city ordinances."

SECTION 27. That among the powers herein conferred on the board of aldermen, they shall provide water, provide for repairing and draining the streets, regulate the market, take all proper means to prevent and extinguish fires, make regulations to cause the due observance of Sunday, appoint the police force, and regulate, suppress and remove nuisances, preserve the health of the city from contagious or infectious diseases, appoint constables to execute such precepts as the mayor and other persons may lawfully issue to them, to preserve the peace and order, and execute the ordinances of the city; and shall appoint and provide for the pay, and prescribe duties of all such other officers as may be deemed necessary."

The defendant introduced the following sections of the charter of the city of Goldsboro:

"SECTION 37. That the board of aldermen shall have power to lay and open streets within the corporate limits of the city, whenever by them deemed necessary, and have power at any time to widen, enlarge, change or extend or discontinue any street or streets, or any part thereof, within the corporate limits of the city, and shall have full power and authority to condemn, appropriate or use any land or lands necessary for any of the purposes named in this section, upon making a reasonable compensation to the owner or owners thereof. But in case the owner of the land and the aldermen cannot agree as to the damages, then the matter shall be referred to arbitrators, each party choosing one, who shall be a freeholder
75 and a citizen of the city; and in case the owner of the land shall refuse to choose such arbitrator, then the sheriff of the county shall, in his stead, select one for him; and in case the two chosen as aforesaid, cannot agree, they shall select an umpire, whose duty it shall be to examine the land condemned and ascertain the damages sustained, and the benefits accruing to the owner in

consequence of the change, and the award of the arbitrators or umpire shall be conclusive of the rights of the parties, and shall vest in the aldermen the right to use the land for the purposes specified; and all damages agreed upon by the aldermen or awarded by the arbitrators or umpire shall be paid as other city liabilities, by taxation, provided,

"SECTION 38. That the board of aldermen shall have authority to put to and keep at work upon the streets and public grounds of the city any person or persons who may fail to pay any fine, penalty or forfeiture which may have been imposed on such person or persons by the mayor of the city; and the said aldermen shall have authority by the ordinances and by-laws of the city, to confine, control and manage each person or persons until the said fines, penalties or forfeitures, together with the cost thereof, shall be fully paid and satisfied, under such rates for labor and board as the aldermen may establish."

"SECTION 48. That the aldermen may require and compel the abatement and removal of all nuisances within the city, at the expense of the person causing the same or the owner or tenant on the grounds whereon the same may be and may regulate, if allowed to be established, any slaughter house or place, or the exercise within the city of any offensive or unhealthy trade, business or employment."

"SECTION 55. That the board of aldermen may govern and regulate the speed of railroad trains while running within the corporate limits of the city; and prohibit the ringing of bells, blowing of steam whistles, either during the day or night, within the city limits."

"SECTION 58. That the board of aldermen shall not have
76 power to impose for any offense a larger penalty than fifty (50) dollars unless the same be expressly authorized, and from any judgment of the mayor by this act or for any other cause of action herein allowed, the party dissatisfied may appeal in like manner and under the same rules and regulations as are prescribed for appeals from a judgment of a justice of the peace."

"SECTION 61. That the city of Goldsboro may establish a system of sewerage, may pave its streets and sidewalks, may establish a system of waterworks, or may purchase the system now in operation in said city; may establish a gas, electric or other plant for furnishing lights, or may purchase the electric light plant now in operation in said city; may build and own a city hall and market house, and may own and operate any or all of these improvements, and may make other public improvements; and may apportion the cost of the same equally among the inhabitants; and, for the purpose of providing such improvements, may, as and when the board of aldermen may determine, issue its bonds, from time to time, to an amount not exceeding in the aggregate the sum of two hundred thousand dollars ($200,000) of such denominations and in such proportions as the board of aldermen may deem advisable by said board, said bonds to be of such form and tenor and transferrable in such way, and the principal thereof payable or redeemable at such time or

times, not exceeding fifty (50) years from the date thereof, and at such place or places as the board of aldermen may determine, said bonds may be issued for any of said purposes or for two or more, or for all."

Amended Minutes of Regular Meeting of Board of Aldermen.

GOLDSBORO, N. C., *August 2nd*, 1909

Regular meeting of the Board of Aldermen, Mayor Higgins in the chair. Present, Aldermen: Borden, Dixon, Kornegay, Draper, Craeford, Weil, Creech and Collins.

77 Minutes of all meetings held in July were read and approved.

On motion *of* the tax rate for general city purposes for the year 1909 was fixed at 50c. on the $100.00 assessed valuation on property, and $1.50 on each pole, and the school tax rate as follows:

Sewerage, 5c. waterworks, 5c; electric lights, 5c.; city hall, 4c.; street improvement, 5c.; funding 1901, 5c.; funding 1905, 4c.; street and sidewalk, 16c.; and pole on each of these 15c., with the exception of city hall, 12c.; funding 1905, 12c.; street and sidewalk, 48c.

On motion, Financial Committee was instructed to borrow funds to run the city government for the present.

Chairman of the Financial Committee stated that he had suggested to the city attorney that it would be well to bring a friendly suit, so as to have the Supreme Court pass upon the violation of the street and sidewalk bonds that the city contemplates selling in the near future.

On motion, the action of the Chairman of the Financial Committee was approved.

Motion of Alderman Borden was adopted directing that the city secure all of the information possible with reference to street paving, with authority to visit other cities at the cost of the city, and inspect personally and inform themselves as to the cost where paving of different kinds have been laid, and especially inform themselves regarding pavement of long standing, and to receive street paving bids, and do anything that they think advisable in the premises.

On motion, the following donations were made, to-wit:

Fire Company, No. 1	$50.00
Eclipse Fire Company	50.00
Electric reel	25.00

Motion made by Alderman Dixon was adopted, that the Chief of Police notify the management of the Orphan's Home that

78 the connection made with the city sewer system, where it crosses the big ditch, must be put in proper condition at once.

Motion adopted, leaving the revision of the ordinance with the Ordinance Committee.

On motion, the chairman of the different standing committees were instructed to make up a budget, estimating the probable expenditures necessary for the different departments of the city improvement, and report same to the Finance Committee for action at the next regular meeting.

The Mayor, in his report, suggested that in his opinion it was necessary to employ another suitable person as police officer. On motion, the suggestion was referred to the Police Committee, with instruction to report at the next regular meeting.

The Mayor also suggested that metre boxes, especially on paved streets, have metal covering.

The Treasurer reported for the month of July as follows:

Balance on hand last report, $1,369.12; receipts during July, $718.24; disbursements during July, $2,434.10. Balance on hand August 1st, $153.26.

The Tax Collector reported collection for July in the amount of $539.04.

The Clerk reported receipts for July of $288.25.

The city pay-roll, $649.16, was read and approved.

Bills to the amount of $1,531.31 were read and approved.

On motion, the Board adjourned.

GOLDSBORO, N. C., *December 27th*, 1910.

At a meeting of the Board of Aldermen of the City of Goldsboro, called and held in the city hall, on Tuesday, December 27th, 1910, the following members of the Board being present: Mayor John R. Higgins, presiding. Aldermen: Borden, Creech, Collins, Crawford, Peacock and Draper.

Alderman Creech offered the following resolution, which was seconded by Alderman Borden:

79 Whereas, at the regular meeting of the Board of Aldermen in the city of Goldsboro, held on the 2nd day of August, 1909, R. A. Colvin, city engineer, who had theretofore been directed by the Board to establish and report to the Board the grades of East and West Centre of said city, preparatory to paving the same, made a verbal report to the effect that in compliance with the direction of the Board, he surveyed the said streets and established the grades of same, and exhibited to the Board profiles of said streets, showing the said grades and estimates made by him; and, whereas, it was on motion ordered that the city report be adopted and said grades established by said city engineer, as shown in the said profiles, be approved and adopted as grade of said streets, and that said profiles be filed with the Clerk of said city; and, whereas, by some oversight no minutes were made of the said report, or of the adoption of same; and, whereas, said profiles are now attached to an affidavit of R. A. Colvin in the action of the A. C. L. R. R. Co. against the City of Goldsboro, now pending in the Superior Court of Wayne County: Now, therefore, be it resolved that the minutes of the said meeting be now amended and corrected so as to show the making of the said report, and the adoption of the same, and the estimate of the said

grades, and the Clerk is directed to so amend the minutes of the aforesaid meeting.

On motion, the Board adjourned.

John R. Higgins, being duly sworn, deposes and says that he was Mayor of the City of Goldsboro at the time the foregoing report of the city engineer was made on August 2nd, 1909, and that the minutes of the said meeting, both as it was at the time of the meeting on August 2nd, 1909, and as it is now amended, is a true and lawful copy thereof. The said Higgins further says that he is at present Mayor of said city.

JOHN R. HIGGINS, *Mayor.*

Attest:

D. J. BROADHURST,
City Clerk.

Sworn and subscribed to before me this 27th day of December, 1910.

C. E. STANLEY, *N. P.* [SEAL.]

80 NORTH CAROLINA,
Wayne County:

Superior Court.

(Title of Cause.)

Jos. E. Robinson and B. M. Denmark, being duly sworn, deposes and says that they are familiar with the railroad tracks running along East and West Centre streets, in the city of Goldsboro, and at certain points along said streets at several of the crossings as they now are, render dangerous the traffic of the public, and that they are a nuisance.

JOS. E. ROBINSON.
B. M. DENMARK.

Sworn and subscribed to before me this 27th day of December, 1910.

JAS. R. HATCH, *C. S. C.* [SEAL.]

NORTH CAROLINA,
Wayne County:

Superior Court.

(Title of Cause.)

J. L. Barham, being duly sworn, says that at the time the case of the City of Goldsboro v. A. C. L. R. R. Co. referred to in the reply of the plaintiff herein was pending in Wayne Superior Court, affiant was City Attorney of said city, and participated in making up the agreed statement of facts on which the said action was heard; that the facts therein stated were merely for the purpose of facilitating

the hearing of that case and not for the purpose of establishing the ownership of the land covered by East and West Centre streets.

J. LANGHORNE BARHAM.

Subscribed and sworn to before me this 27th of December, 1910.

C. E. STANLEY, *N. P.* [SEAL.]

NORTH CAROLINA,
Wayne County:

Superior Court.

(Title of Cause.)

R. A. Colvin, being duly sworn, deposes and says, that he is a civil engineer by profession, a graduate of the University
81 of Texas, and has for some years been in the employment of the city of Goldsboro as city engineer; that as such city engineer and by direction of the Board of Aldermen of the city of Goldsboro, he surveyed and established grades for the purpose of paving the streets of the said city, and that a number of the said streets so surveyed and on which the grades were so established have been paved by the city of Goldsboro in accordance with the survey and establishment of the said grades; that among the streets which affiant surveyed and established the grade are the following: East and West Center streets which extend north and south through the center of said city (and on each are situate the tracks of the A. C. L. R. R. Co. the Southern Railway Company and the Norfolk Southern Railroad Company), Elm street, Pine street, Spruce street, Chestnut street, Ash street, Oak street, Vine street, Beech street and Holly street, which run east and west crossing the said East and West Center streets and the said railroad tracks; that the said streets are graded according to the usual methods and in such a way as to provide for the flow of water along said streets and for the passing of pedestrians and vehicles over and across the said East and West Center streets; that after the establishing the grades of the said streets affiant reported the same to the Board of Aldermen of said city and said report was adopted, and it was ordered that the work of paving said streets conform to the grades so established; that profiles of said grades on East and West Center streets were reported by affiant to the said Board of Aldermen and duly adopted by said Board, and are hereto attached, marked "A" and made part hereof, the black lines therein indicate the old grades of said streets and the red lines the new grades established by affiant and approved by said Board; that a map made by affiant of East and West Center streets and intersecting streets of said city showing location of the same and of the railroad tracks of the said railroads, and which is substantially correct, is
82 hereto attached, marked "B" and made part hereof; that the city has paved three blocks on West Center street from Ash to Chestnut streets inclusive with bithulithic, and had theretofore paved three blocks on East Center street with macadam extending from Chestnut to Ash streets inclusive; that the said city has since

the establishment of said grades paved Chestnut street and Mulberry street on both sides of East and West Center streets and crossing said West Center and East Center streets with bithulithic pavement, and had heretofore paved Walnut street east and west across said East and West Center streets with macadam; that the paving already done by the city is preliminary to the further paving of said East and West Center streets and the said streets intersecting the same to be carried forward upon the grade so established; that at the point where Beech street crosses the said railroad tracks the said tracks are elevated 18 inches above the grade established for Beech street; that at the point where Vine street crosses the said railroad tracks the said tracks are elevated 17 inches above the grade established for said Vine street and over said East and West Center streets, and where the said tracks are crossed by Oak street the tracks are elevated 18 inches above the grade established for Oak street, and where the said tracks are crossed by Ash street the tracks are elevated 18 inches above the grade established for Ash street, and where the said tracks are crossed by Mulberry street the tracks are elevated 6 inches above the grade established for Mulberry street; that the said railroad tracks where they are crossed by Walnut, Chestnut, and Holly streets conform to the established grade; that the said tracks where they are crossed by Spruce street are 2 feet and 4 inches below the grade, and at Elm street are 6 feet and 3 inches below the established grade; that the crossings over the said railway tracks at Elm, Pine and Spruce streets are inconvenient, dangerous and almost impassable for traffic over and across the said streets and that it is impracticable for the city to remedy the said inconvenience and dangers;

83 that the crossings over the said tracks at Mulberry, Ash, Oak, Vine and Beech streets are very bad on account of the elevation of the said tracks above the established grade, particularly on account of the inconvenience and dangers suffered by vehicles in cross- the same; that it is impossible for the city in any way to remedy this condition while the said tracks remain upon the said streets at their present elevation; that it is entirely practicable for the plaintiff and the railway companies using the said tracks to lower the same from Walnut street to Holly street and conform the same to the said established grade without injury or inconvenience in the operation of trains over the same and at little expense; that affiant has made a careful estimate of the costs of so lowering the said tracks to conform with the said grade, and is of opinion that the expense to the plaintiff and the said railroad companies could not exceed the sum of $3,000.00; that the lowering of the said tracks would work no hardship on the plaintiff by reason of the change of grade nor render the operation of its trains more difficult, inconvenient or expensive; that while the tracks of the said railroad companies remain in their present condition and do not conform to the grade established by the defendant the flow of surface water is obstructed and ponded on the streets of the city, and stands for a considerable length of time in the cut to the south

of Chestnut street where the same becomes stagnant and injurious to the health of the citizens of said city.

R. A. COLVIN.

Sworn to and subscribed before me this the 23rd day of December, 1910.

S. R. STREET, *N. P.* [SEAL.]

NORTH CAROLINA,
Wayne County:

Superior Court.

(Title of Cause.)

John R. Higgins, being duly sworn, says that he is the Mayor of the city of Goldsboro, and has been such Mayor since May,
84 1909; that at a meeting of the Board of Aldermen held during the summer of 1909, but the date of which meeting affiant is now unable definitely to recall, Mr. R. A. Colvin, city engineer, who had theretofore been appointed by the Board of Aldermen to make a survey of said city, and establish the grades of the streets with a view to paving the sidewalks and streets of the same, made his report, a part of which consisted of profiles of East and West Center streets marked "A" and made a part of the affidavit of R. A. Colvin filed herein, showing by means of the black line appearing upon the said profile the original grade of the said East and West Center streets and by means of the red lines thereon the grades so established by him, which report was duly adopted by the said Board and the said grades established by him on East and West Center streets adopted as the grade established by him on East and West Center streets adopted as the grades for East and West Center streets; that by some oversight the said report and the action of the Board thereon was not spread upon the minutes of the said meeting; that affiant has searched diligently the minutes of the meetings of the said Board and finds that the report and its adoption does not appear thereon.

That the grades so established by the Board upon the report of the city engineer were thereafter and before the adoption of the ordinances of November 1st, 1909, called to the attention of the officials of the plaintiff and they were fully informed as to the grades of said streets.

JOHN R. HIGGINS, *Mayor.*

Sworn to and subscribed before me, this the 27th day of December, 1910.

C. E. STANLEY, *N. P.* [SEAL.]

85 *Judgment.*

NORTH CAROLINA,
Wayne County:

In the Superior Court at Chambers.

(Title of Cause.)

This is a motion made by the plaintiff to continue until the final hearing a temporary restraining order made by his Honor, O. H. Allen, Judge of the Superior Court: The temporary restraining order, issued November 20, 1909, returnable before his Honor W. R. Allen, Judge of the Sixth District, at Goldsboro, December 9, 1909, was continued by consent from time to time, and was finally removed by consent of parties before the undersigned. The motion to continue the restraining order was heard by consent in the city of Raleigh, on Monday, 16th day of January, 1911, the plaintiff being represented by Messrs. W. C. Munroe and Geo. M. Rose, attorneys, and the defendant by Messrs. D. C. Humphrey and Aycock and Winston, attorneys.

The Wilmington & Raleigh Railroad Company was chartered by the General Assembly of North Carolina at the session of 1833, after which various amendments to the charter were adopted and the General Assembly at the session of 1855 ratified an act by which the name of the Wilmington & Raleigh Railroad Company was changed to the Wilmington & Weldon Railroad Company, and thereafter by successive acts the Atlantic Coast Line Railroad Company became the owner of and entitled to the franchise and rights of the Wilmington & Raleigh Railroad Company.

The town of Goldsboro was created a municipal corporation by the General Assembly at the session of 1844 and was duly organized, and thereafter by legislative enactment the name of the municipality was changed to and now is the city of Goldsboro. The charter of the city was amended by the General Assembly at the sessions of 1901, 1905 and 1909. On November 1, 1909, the duly qual-

86 ified Board of Aldermen of the city enacted certain ordinances (sections 1-6 inclusive), a copy of which is hereto attached, providing that these ordinances should go into effect on November 20, 1909, with the exception of section 5, which was to be in effect ninety days after their adoption. The object of the plaintiff's motion is to enjoin the defendant perpetually from enforcing these ordinances against the plaintiff. Upon the hearing, the plaintiff abandoned its motion to enjoin the enforcement of section one. The plaintiff acquired its right of way along the territory now known as East and West Center streets by deed and the exercise of its right of eminent domain before the defendant was chartered and organized as a municipal corporation; but for fifty years or more the defendant has had charge of these streets, regulating, controlling and treating them as other streets of the city.

The question of the validity of the ordinances referred to has not been determined in favor of the plaintiff in a previous action.

The court has carefully considered the affidavits, record, evidence and argument of counsel, and is of opinion that the facts are not such as to entitle the plaintiff to invoke the equitable jurisdiction of the court, and that the temporary restraining order should be dissolved.

It is therefore ordered and adjudged that the restraining order issued by his Honor, O. H. Allen, be, and the same is hereby vacated and set aside, and that the defendant recover of the plaintiff its costs of this motion, to be taxed by the Clerk of the Superior Court of Wayne County.

W. J. ADAMS,
Judge of the Superior Court.

To the foregoing judgment the plaintiff excepts and appeals to the Supreme Court. Notice waived. Bond in the sum of $50.00 adjudged sufficient.

W. J. ADAMS, *Judge.*

87 "SECTION 1. That it shall be unlawful for any railroad or railway company to operate or run any through or local freight train or any passenger train through the city of Goldsboro, on East and West Center streets at a rate of speed exceeding four miles an hour, and said railroad and railway companies are hereby required to have flagmen to proceed fifty feet in front of each and every through or local freight train or passenger train, to warn persons of the approach of said train. Any railroad or railway company violating this ordinance shall be subject to a fine of $50.00 for each offense.

"SECTION 2. That the shifting limits on East and West Center streets shall be on the south from Spruce street to the city limits, and north from Ashe street to city limts.

"SEC. 3. That it shall be unlawful for any railroad or railway company to do any shifting on East and West Center streets, between Spruce and Ash streets, at any other time than from the hours of 6:30 to 8:30 A. M., and from 4:30 to 6:30 P. M. Any railroad or railway company violating this ordinance shall be subject to a fine of fifty dollars for each offense.

"SEC. 4. That it shall be unlawful for any railroad or railway company to place any car and allow said car to stand for a longer period of time than five minutes at any point on East and West Center streets, between Spruce and Ash streets. Any railroad or railway company violating this ordinance shall be subject to a fine of fifty dollars for each offense.

"SEC. 5. That all railroad and railway companies owning tracks on East or West Center streets between Walnut and Vine streets in said city of Goldsboro, are hereby required to lower said tracks, so as to make the same conform to the grade line of said streets, and said tracks to be filled in between the rails; the grade line of said street being as follows: Beginning at the present grade line, corner

of East and West Center streets and Walnut, to be lowered
88 six inches to the corner of Mulberry and East and West Center streets, ten inches to the corner of Ash and East and West Center streets, eighteen inches to corner of Oak and East and West Center streets, and eighteen inches to corner of Vine and East and West Center streets.

"SEC. 6. That any railroad or railway company failing or refusing to comply with the above ordinance shall be guilty of a misdemeanor and fined fifty dollars, and each and every day that said tracks are allowed to remain shall constitute a separate offense.

"That these ordinances go into effect on November 20, 1909, with the exception of Section 5, which shall go into effect ninety days from this date, November 1, 1909."

NORTH CAROLINA,
Wayne County:

Supreme Court, Spring Term, 1911.

(Title of Cause.)

It is agreed that the summons, complaint, answer, reply, restraining order, undertaking, evidence and the judgment of the Judge constitute the case on appeal in the above action.

It is further agreed that the plaintiff may have twenty days in which to file its exceptions.

This January 31st, 1911.

W. C. MUNROE,
Of Counsel for Plaintiff.
D. C. HUMPHREY,
AYCOCK & WINSTON,
Attorneys for Defendant.

Plaintiff's Exceptions.

NORTH CAROLINA,
Wayne County:

Supreme Court, Spring Term, 1911.

(Title of Cause.)

The plaintiff for its exceptions in the above entitled cause, says:

89 1. That the judge in his findings of fact should have found that the General Assembly at its Session of 1835, authorized the change of the name of Wilmington & Raleigh Railroad to that of the Wilmington & Weldon Railroad, instead of 1855, as therein found.

2. That the judge in his findings of fact should have found that the town of Goldsboro was created a municipal corporation by the

General Assembly at its Session of 1848, instead of 1844, as he did find.

3. That the judge in his findings of fact should have found that the town and city of Goldsboro had exercised its control over the streets known as East and West Center by permission of and in subordination to the rights of the Wilmington & Raleigh Railroad Company, the Wilmington & Weldon Railroad Company and the Atlantic Coast Line Railroad Company.

4. That the judge in his findings of fact should have found that there are a great many industries on the right of way of the Atlantic Coast Line in and near the city of Goldsboro which are dependent for transportation upon the exercise of the acts forbidden by the ordinances of the city by the Atlantic Coast Line Railroad Company, and that the said acts so forbidden are beneficial to the merchants of the city and are not prejudicial to the rights of any of the citizens of the city or of the State.

5. The judge should have found in his findings of fact that the whole of what was called East and West Center streets are covered by the right of way of the Atlantic Coast Line Railroad Company.

6. The judge should have found in his findings of fact that the city of Goldsboro has never condemned the right of way of the defendant for use as street or streets, nor has ever paid the plaintiff therefor or made any compensation therefor.

7. The judge should have found in his findings of fact that the North Carolina Railroad Company and the Atlantic & North
90 Carolina Railroad Company occupied the right of way of the Atlantic Coast Line Railroad Company by permission of the plaintiff and those under whom it claims.

8. The judge should have found in his findings of fact that that portion of the right of way of plaintiff through the city of Goldsboro occupied by plaintiff's roadbed and the roadbed of the other two railroads named in the pleadings and by the warehouses of the said two last referred to railroads along what is known as East and West Center streets was from Chestnut street south to the boundaries of the city, is a cut from 1 to 10 feet deep, and from Walnut street to the boundaries of the city the tracks are and have been elevated from 3 to 10 inches above the surface of the balance of the right of way except at the crossings, and that no portion of said right of way so occupied by the said tracks and warehouses has ever been used, occupied, controlled or worked by the defendant, except that portion between Walnut street and Chestnut street, which was for a short time used for station grounds, and the same may have been used as a street for the purpose of travel, but no other portion of said right of way occupied by said roadbed and warehouses was ever used so.

9. The judge in his findings of facts should have found that the enforcement of said ordinances, except the first section thereof by the defendant would be a practical appropriation of the right of way of the plaintiff, and would be of irreparable damage to the plaintiff, and would be a substantial confiscation of the right of way and the rights under the franchises of the plaintiff.

10. The Judge should have found in his findings of fact that the defendant had no right to condemn land for the use of streets except when an agreement for the purchase thereof cannot be entered into with the owner, and that then it is the duty of the defendant to select one man and the owner another, and if these two cannot agree they should have the right to select an umpire whose decision as
91 to the value of the said property and the compensation to which the owner is entitled is conclusive.

11. The judge should have found in his findings of fact that the enforcement of said ordinances by the defendant against the plaintiff, if the plaintiff had exercised its rights under its charter, would result in innumerable prosecutions, the penalties in which would in the aggregate amount to a very large sum of money.

12. The judge should have found in his findings of fact that the right to shift cars at all times of day and unload cars along its right of way in the city of Goldsboro was highly beneficial to the merchants of said city, and of great value to the plaintiff, and also necessary to the efficient and prompt discharge of its duties to the public, and was not injurious to the rights of any person whatever.

13. The judge should have found in his findings of fact that the grading of the right of way required of the plaintiff in the ordinances referred to was wholly unnecessary and a burden upon the plaintiff without any adequate compensation to the plaintiff or to the public.

14. The judge should have found in his findings of fact that the only right expressly given to the defendant in its charter with reference to railroads is that to regulate the speed of trains passing through said city.

15. The judge should have found in his findings of fact that the penalties prescribed for violations of said ordinances were so large and unreasonable that they make it practically impossible for the plaintiff to test their validity by an exercise of its constitutional rights in the legitimate use of its own property, and an enforcement thereof against the plaintiff for such exercise of its rights in violation of said ordinances would virtually amount to depriving the plaintiff of its property without due process of law.

16. The judge should have found in his findings of fact that the plaintiff is the owner of its right of way through the city of Goldsboro which embraces or covers the streets known as East and
92 West Center streets, and entitled to the use and occupation thereof for all legitimate purposes, for which the plaintiff and those under whom it claims were incorporated.

17. The judge should have found in his findings of fact that the plaintiff did not build a belt line around the city of Goldsboro with the intent of abandoning the right of way through the city of Goldsboro, but that it built said line solely for the purpose of reaching the union station which it, the Southern Railway and the Norfolk & Southern Railway were compelled to erect outside of the city limits on the petition of the defendant and by order of the Corporation Commission of the State of North Carolina.

18. The judge should have held that the plaintiff was entitled to

the relief asked for in the complaint instead of holding that it was not entitled to equitable relief.

19. The judge should have held that the enactment of said ordinances by the defendant was an attempt to exercise the power of eminent domain, and the enforcement of said ordinances would be practically a condemnation of the right of way of the plaintiff to the use of the defendant as a street contrary to the charter of the plaintiff and without compensation.

20. The judge should have held that the enactment of said ordinances by the defendant was an attempt to violate the contract entered into between the State and the plaintiff and those under whom it claims as contained in the charter of the Wilmington & Raleigh Railroad under the various amendments thereto, and the charter of the plaintiff and the statutes under which it acquired the rights of the Wilmington & Weldon and the Wilmington & Raleigh Railroad Companies contrary to Article 10 of the Constitution of the United States.

21. The judge should have held that the enforcement of said ordinances by the defendant would be a practical appropriation of the right of way and property and rights of the plaintiff to the use of the defendant without due process of law contrary to the
93 spirit of the Constitution of the State of North Carolina and the 14th Amendment to the Constitution of the United States, which provided, that, "No State shall make or enforce any law which shall abridge the privileges or immunities of the citizens of the United States; nor shall any State deprive any person of life, liberty or property without due process of law.

22. The judge should have held that Sections 2, 3, 4, 5, 6 of said ordinances are void.

23. The judge should have held that the defendant had no right to pass an ordinance with reference to the grading of the right of way of the plaintiff; that the question of gradings at crossings and the payment of the costs thereof has been committed by the Legislature of North Carolina, to the Corporation Commission having any right to control or interfere with the grade of the plaintiff's right of way, except at the crossings, which power with reference to the grading at crossings is expressly given to the Corporation Commission.

24. The judge should have held that the plaintiff has no remedy at law by which it can defend itself from the unlawful appropriation of its property to the use of the defendant undertaken to be accomplished by the passage of said ordinances.

25. The judge should have held that the plaintiff is the owner in fee of its right of way through the city of Goldsboro and what is known as East and West Center streets.

GEO. B. ELLIOTT,
GEO. M. ROSE,
W. C. MUNROE,
Attorneys for Plaintiff.

NORTH CAROLINA,
Wayne County:

Supreme Court, Spring Term, 1911.

(Title of Cause.)

The undertaking on appeal in the above entitled cause is hereby waived.

D. C. HUMPHREY,
Of Counsel for Defendant.

94 *Clerk's Certificate.*

STATE OF NORTH CAROLINA,
Wayne County:

I, Jas. R. Hatch, Clerk of the Superior Court, do hereby certify that the foregoing is a true, full and correct copy of the record in this action now pending in the Superior Court of Wayne County, wherein the Atlantic Coast Line Railroad Company is plaintiff, and the city of Goldsboro is defendant.

In witness whereof, I have hereunto set my hand and affixed my seal at the court house in Goldsboro, this the 21st day of February, 1911.

JAS. R. HATCH,
Clerk Superior Court, Wayne County, N. C.

95 *Docket Entries.*

Appeal docketed in Supreme Court North Carolina February 25, 1911. Argued March 15, 1911. Reargument ordered to be heard at end of Thirteenth District Appeals—Reargued May 3, 1911. Opinions by Clark, C. J. and Brown, J. concurring filed May 31, 1911, as follows:

96 Supreme Court of North Carolina, Feb. Term, 1911, Wayne.

#223.

ATLANTIC COAST LINE RAILROAD COMPANY, Appellant,
v.
CITY — GOLDSBORO.

W. C. Munroe; Geo. B. Elliott and Geo. M. Rose for plaintiff.
D. C. Humphrey and Aycock & Winston for defendant.

97 Supreme Court North Carolina, Spring Term, 1911, Wayne.

#223.

R. R.
v.
GOLDSBORO.

CLARK, *C. J.*:

The A. C. L. R. R., originally the Wilmington & Weldon R. R. Co. occupies with its track the chief street of the city of Goldsboro. Its right of way, 65 ft. on each side of its roadbed, embraces the whole of what is known as East and West Center streets, which extend north and south the entire length of the city. The right of way was originally acquired about 1835, and the town has been built up on either side and became incorporated in 1847. The city of Goldsboro under the authority of the powers granted in its charter has instituted a system of grading its streets and of drainage extending thruout the city. In pursuance of this work the roadbed of the R. R. on Center Street in some places is now 6 inches and from that to 18 inches higher than the grade of that street and of the other streets of the city which cross East and West Center streets at right angles.

The city authorities have passed an ordinance providing that "all R. R. companies owning tracks on East and West Center streets, between Walnut and Vine streets, in said city of Goldsboro are hereby required to lower said tracks, so as to make the same conform to the grade line of said streets and said tracks to be filled in between rails; the grade line of said street being as follows: Beginning at the present grade line corner of Walnut and East and West Center streets to be lowered 6 inches to corner of Mulberry and East and West Center streets, 10 inches to corner of Ashe and East and West Center streets and 18 inches to corner of Vine and East and West Center streets." Another section of the ordinance provides that failure or refusal to comply with the ordinance should be a misdemeanor and fined $50. The plaintiff attacks this ordinance as being unconstitutional and void and sought to enjoin all enforcement of the ordinance by a criminal proceeding.

The city has heretofore graded and paved at its own expense said East and West Center street outside of that part of the street occupied and used by the defendant as its roadbed. The injunction was refused and the plaintiff appealed.

The city has from time to time laid out numerous streets crossing said right of way and has worked and maintained its streets and cross streets for more than 60 years, including all of East and West Center streets outside of the actual space occupied by plaintiff's roadbed.

98 As a general rule a court of equity has no jurisdiction to restrain a State from prosecuting for a violation of its statutes and ordinances. The ordinances in question were made by the

city in pursuance of its governmental authority. We need not enter into the learned and elaborate discussion as to what cases, if any, present exceptions to this general rule for we are of the opinion that the ordinance requiring the plaintiff to lower its track from 6 to 18 inches at the points where the cross streets pass over the R. R. track is a legal exercise of the public authority vested in the defendant.

The plaintiff took its charter expecting that towns and cities would grow up along the line of its road, and knowing that with the development of the country new roads, and in the cities and towns that new streets would be laid out across its right of way. And it took its charter knowing too that the State would have the right to lay out such roads and new streets and to require the R. R. to make such alterations as would prevent the passage over its track by the public being impeded.

In English v. New Haven 32 Conn. 241 it was held that the city had the right to require the R. R. Co. to widen the crossing of a street over its track or to make such other changes as the public convenience and necessity might require in order there should be no hindrance to the public in crossing the R. R. track. In R. R. v. Bristol 151 U. S. 556 it was held that the imposition upon a R. R. Co. of the entire expense of a change of grade at a R. R. crossing is not a violation of any constitutional right.

In Cleveland v. Augusta 102 Ga. 233; 43 L. R. A. 638, the subject is fully discussed in a very able opinion which holds that a R. R. Corporation must make such alterations in the change of its grade as will conform to the new grading of the streets adopted by the city. In R. R. v. Duluth 208 U. S. 583 it was held that "the right to exercise the police power is a continuing one that can not be limited or contracted away by the State or its municipality, nor can it be destroyed by compromise as it is immaterial upon what consideration the attempted contract is based. Such power when exercised in the interest of public health and safety is to be maintained unhampered by contracts and private interests, hence an ordinance by a city compelling a R. R. to repair a viaduct constructed after the opening of a road is valid tho the city for a substantial consideration had contracted to relieve the R. R. Co. from
99 making such repairs for a term of years."

In the present case however there was no contract exempting the R. R. from changing its grade at such crossings when required. Indeed sec. 27 of plaintiff's charter in the laws of 1833 expressly requires the plaintiff to do what the city now requires. Said section provides "It shall be lawful for the said R. R. company in the construction of its said road to intersect or cross any public or private way established by law; and it shall be lawful for them to run their road along the route of any such road; provided whenever they intersect and cross such public or private road the president or directors shall cause the R. R. to be so constructed as not to impede the passage of travelers on said public road or private way aforesaid. "In Minneapolis v. R. R., 98 Minn., 380, 28 L. R. A. (N. S.) 307 the Supreme Court of Minn. held that an almost iden-

tical provision in the charter of a R. R. Co. was as applicable to new public roads laid out across the right of way as it was to old roads over which the right of way ran, and said "The purpose of incorporating this particular provision in the charter of the R. R. Co. was in the interest of the public and to require the R. R. Co. to keep in good repair all crossings at the intersection of highways. * * * The evils intended to be guarded against are the same, and apply equally to both new and old streets. There was no reason why the Legislature should deem it prudent to provide for existing highways only, and we do no violence to the rules of statutory construction in holding that the provisions of defendant's charter were intended to include all streets and highways intersected by R. R.'s whether laid out before or after building of the R. R. The expression of the statute is special perhaps; but the reason therefor is general. The expression must therefore be deemed general. A R. R. Co. accepts and receives its franchise subject to the implied right of the State to lay out and open new streets and highways over its tracks and must be deemed as a matter of law to have had in contemplation at the time its charter was granted, and is bound to assume, all burdens incident to new, as well as existing crossings." The same doctrine has been held in Maine, Conn., Ill., N. Y., Tenn., Indiana, Texas, Miss., Ohio, Neb., N. J., Vermont, Wisconsin, and by the U. S. Supreme Court. Indeed, the above case from Minn. was affirmed 214 U. S. 497.

In the above cited case of Cleveland v. Augusta 102 Ga. 233, 43 L. R. A. 638, the R. R. ran across the public road which
100 was not then a street. When the territory was taken into the city its authorities changed the road to a street and raised the grade at that point, and required the R. R. to raise its grade. This the R. R. refused to do unless the city would pay the expense. The Court held that the R. R. Co. was liable for the expense of raising its roadbed to conform to the city grade, and said that it must yield to the reasonable burden imposed by the growth and development of the country or the city, and where the public welfare demands a change of grade of the highway or street, the R. R. Co. must, at its own expense, make such alterations in the grade of its crossings as will conform to the new grade. That case is exactly in point. In the course of its opinion the Court said "Upon streets or highways crossed by it, or subsequently laid out, the R. R. Co. must construct proper crossings." Lancaster v. R. R. 29 Neb. 412; R. R. v. Smith 91 Ind. 119, 13 Am. & Eng. R. R. cases 608, and must alter, change, or otherwise re-construct such crossings whenever the public welfare demands. Eng. v. New Haven Co. 32 Conn. 240. The doctrine is further clearly stated thus by the Court." When the R. R. Co. laid its track across the highway, it did so subject to the right of the public authorities to make such alterations or changes in the highway, either by lowering or raising the grade, widening or otherwise improving the same, as the public safety and welfare might require. In doing so, the presence of the R. R. necessitates a certain character of crossings and safeguards which otherwise would not exist; and with however much plausibility it

might be argued that the public authorities should be required to do just such work as they would have to do did the R. R. not exist, it is certain that the R. R. Co. should bear the burden of such work as is made necessary by reason of the peculiar and dangerous character of its operation. The principle of the common law is embodied in this statute. It is the R. R. which makes the construction of a R. R. crossing necessary, whether the highway be laid out before or after the construction of the railroad."

In R. R. v. Minn. 208 U. S. 583 it is said "As the Supreme Court of Minn. points out in its opinion 98 Minn. 380 the State courts are not altogether agreed as to the right to compel R. Rs. without compensation to construct and maintain suitable crossings at streets extended over its right of way after the construction of the R. R. The great weight of State authority is in favor of such right, see cases cited 98 Minn. 380. There can be no question as to the attitude of this court upon this question, as it has been uniformly held that the right to exercise the police power is a continuing one, 101 that it can not be contracted away, and that a requirement that a corporation or an individual comply with reasonable police regulations without compensation, is the legitimate exercise of the power and not in violation of the constitutional inhibition against the impairment of obligations of contract.". Here, the city in pursuance of its right, has graded the streets of the city and put in a system of drainage both of which are impeded by the R. R. maintaining its roadbed on Centre St. from 6 to 18 inches above the level of the streets crossing it, its roadbed extending thru the entire length of the city on this main street.

The plaintiff earnestly contends that inasmuch as Rev. 1097 (10) authorised the Corporation Commission to require the raising or lowering by a R. R. of its track or highway at any crossing and to designate who shall pay for the same, that this deprives the city of Goldsboro of the right to exercise its police power in that regard. The provision just cited giving the Corporation Commission the power stated is not in derogation of that conferred in the charters of towns and cities, but is supplementary merely.

The plaintiff also contends that Rev. 388 that no R. R. Co. etc. shall be barred by the statute of limitations as to its right of way and etc. by occupation of the same by any person whatever deprived the city of the right there claimed. This is a misconception. The defendant is not contending for the ownership of the soil of East and West Centre streets. It is merely asserting its rights to require the R. R. Co. to change the grade of its roadbed where it is crossed by other streets so that public travel and the drainage of the city may not be impeded.

A further ordinance of the city prohibits the R. R. from doing any "shifting on East and West Center streets between Spruce and Ashe at any other time than from the hours of 6.30 and 8.30 A. M. and from 4.30 to 6.30 P. M. or to allow any car to stand for a longer period than 5 minutes at any point on East and West Center streets between Spruce and Ashe under a penalty of $50 for each offence. East and West Center streets constitute the main street of the town,

and that portion of it between Spruce and Ashe—4 blocks, is the very heart of the city. In a former action, in which this plaintiff in this case was a defendant, Dewey v. R. R. 142 N. C. 392 the plaintiff herein, which was defendant in that action, alleged in its answer as follows: "The operation of the trains along said Center
102 street increases annually and the danger accordingly; trains are constantly passing and the crossings notwithstanding the utmost diligence and care on the part of the R. R. are necessarily blocked: said Center St. is the main business street in the city, it is frequently crowded with pedestrians and vehicles and the operation of so many trains daily thruout the length of said street, is fraught with danger to life and property". This statement admission and averment of the plaintiff herein, made under oath, is set up in the answer in this case in which an injunction is sought and it is admitted in the reply.

We understand the ordinance in forbidding "shifting" within the limited space of 4 blocks, on the main street in the center of the town, to refer to what is commonly understood by that expression to-wit, the "cutting out and putting in" cars in the making up of a train before it is dispatched on its journey. Such a regulation certainly can not be held void, and is a reasonable exercise of the police power necessary for the convenience and safety of the public at the 4 crossings designated. Whether such ordinance would be reasonable in smaller towns is a question not before us.

We certainly do not understand the term "shifting" to refer to the "transfer" of a train of cars already made up and to be delivered by the plaintiff Co. to another R. R. Co. to be transported. The ordinance does not apply to the transfer of a car or cars from one R. R. to another thru the city. Whether an ordinance forbidding the transfer of the cars from one R. R. to another thru said street except at specified hours would be reasonable, in view of the fact that at Goldsboro such cars can be transferred by way of the physical connection of the tracks of all the R. Rs. on the edge of town at the new Union station might admit of debate. But that question is not before us. The plaintiff R. R. Co. has its shifting yards further out where its trains can be made up and where at least the chief part of the necessary shifting can be done. Certainly it is a reasonable exercise of the police power to forbid such "shifting" except at specified hours, on 4 blocks of the plaintiff's track, in the heart of the town.

The plaintiff's official returns show $223,000,000 of property owned by it. The defendant's counsel having adverted to the very large proportion of this property held by the plaintiff in this State, the plaintiff's counsel replied that Goldsboro had only 6,107 population and contended that for "a little town like that to interfere with the operation of so vast an enterprise" was, to use his ex-
103 pression "Like the tail wagging the dog". It is such a mistaken standpoint that doubtless induced the plaintiff on this occasion, and has so often induced such corporations, to assert what they deem their rights in defiance of the evident convenience and desire of the public, by means of whose patronage, such corporations

thrive, and make their profits. It is true the city of Goldsboro is not large. But the powers it has exercised in making these ordinances, it exercises in the name of, and by the right of the sovereignty of the people of this State. From that sovereignty the plaintiff derives its rights and its very existence. It was incorporated solely for the public convenience and subject to public regulation. Its stockholders were exempted from personal liability and it was granted the power of the State's right of Eminent Domain to procure its right of way and to exercise its vocation. The right of the plaintiff to derive a profit from its business is an incident of a private nature and subject to the right of the sovereign to regulate its operations and to "alter or repeal its charter, at will" Cons. Art. VII. Sec. 1.

The requirement by the authorities of Goldsboro that the plaintiff R. R. Co. shall at its own expense (— 400) change its grade where its road is crossed by other streets, to conform to the grade adopted by the city and its prohibition of "shifting" to make up trains on the main street of the town, within 4 blocks in the heart of the city, except in specified hours are lawful exercise of the police powers conferred upon the city, by the sovereign power in this State. Cooper v. R. R. 140 N. C., 229; Wilson v. R. R. 142 N. C. 348; Gerringer v. R. R. 146 N. C. 35. The only unreasonable aspect of the controversy is that the plaintiff should have resisted such requirements instead of yielding immediate assent or indeed preventing the necessity of the passage of such ordinance, by anticipating the wishes of the public in a matter so essential to the safety, comfort and health of the town.

Affirmed.

104 Supreme Court of North Carolina, Feb. Term, 1911.

#223. Wayne.

ATLANTIC COAST LINE R. R.
v.
CITY OF GOLDSBORO.

BROWN, *J.*, concurring in part:

The following ordinance- of the City of Goldsboro are attacked by the plaintiff upon the ground that they are an unlawful interference with the chartered property rights of the plaintiff as well as an impediment in the discharge of its duty to the public, viz;

SEC. 2. That the shifting limits on East and West Center streets shall be on the south from Spruce Street to the city limits, and north from Ash Street to city limits.

SEC. 3. That it shall be unlawful for any railroad or railway company to do any shifting on East and West Center streets, between Spruce and Ash streets, at any other time than from the hours of 6.30 to 8.30 A. M., and from 4.30 to 6.30 P. M. Any rail-

road or railway company violating this ordinance shall be subject to a fine of fifty dollars for each offense.

SEC. 4. That it shall be unlawful for any railroad or railway company to place any car and allow said car to stand for a longer period of time than five minutes at any point on East and West Center streets, between Spruce and Ash streets. Any railroad or railway company violating this ordinance shall be subject to a fine of fifty dollars for each offense.

SEC. 5. That all railroad and railway companies owning tracks on East and West Center streets between Walnut and Vine streets in said city of Goldsboro are hereby required to lower said tracks, so as to make the same conform to the grade line of said streets, and said tracks to be filled in between the rails; the grade line of said street being as follows; Beginning at the present grade line,
105 corner of Walnut and East and West Center streets, to be lowered six inches to corner of Mulberry and East and West Center streets, ten inches to corner of Ash and East and West Center streets, and eighteen inches to corner of Vine and East and West Center streets.

I concur fully in the opinion of the Chief Justice in so far as it refers to ordinance number five requiring the railways entering the city to lower their tracks at street crossings so as to conform to the grade line of the streets.

This requirement does not interfere with the traffic of the railways or impede them in the performance of their obligations as common carriers, and evidently will add materially to the safe and convenient use of the streets. This ordinance seems to be supported by the weight of authority. But I find no authority to support the ordinance fixing shifting limits and undertaking to prohibit the use of portions of plaintiff's tracks for shifting purposes during the large part of both day and night, and none has been cited to us.

I take it to be settled now by abundant authority that when it is shown that a municipal ordinance unlawfully interferes with the chartered rights, duties, as well as business of a common carrier, and will seriously obstruct the carrier in the discharge of its duties to the public, the enforcement of such ordinance will be enjoined.

In Dobbins v. Los Angeles, 195 U. S. 223, the Supreme Court of the United States says "It is well settled that where property rights would be destroyed unlawful interference by criminal proceedings under a void law or ordinance may be reached and controlled by a decree of a Court of Equity." Smith v. Ames, 169 U. S. 466; Prentiss v. A. C. L. R. R., 124 U. S. 228; Water Works v. Vicksburg, 185 U. S. 82; Milwaukee E. R. & L. Co. v. Bradley, 84 N. W. 875.

In Schlitz Brewing Co. v. City of Superior, 93 N. W. 112, 1 the Supreme Court of Wisconsin says: "This court has recently had the general subject under discussion, and, after full consideration, has laid down the rule that equity may enjoin such prosecu-
106 tions where they are resorted to or threatened as a means of preventing the enjoyment of property rights, and there is not any way to adequately remedy the mischief."

The principle upon which injunctive relief may be given in cases

of this character is stated by this court in R. R. v. Olive, 142 N. C. 265: "Injunctive relief against interference with the use of the right-of-way of a railroad company is not given because of any special consideration for these corporations, but because they are public agencies chartered, organized and given the right of eminent domain in the contemplation of law to serve the public; they are a part of the system of highways of the State." The Federal Courts take the same ground and for a similar reason. "It is settled," said the Court, in Southern Exp. Co. v. Ensley, 116 Fed., 756, "that a court of equity should enjoin the enforcement of a municipal ordinance, though violations of it are punished criminally, when its enforcement will affect the illegal destruction of, or a grave interference with a corporate franchise, in the operation of which, the public have an interest."

If this were not true any municipal corporation by repeated arrests of the carrier's servants for violation of some ordinance, might bring its trains to a stand-still, paralyze its business and seriously injure the interests of the public, who are dependent upon the carrier's service.

The defendant's counsel base the right to enact the switching ordinances upon the police power of the city, contending that it is per se a nuisance to conduct such operations in a public street, because dangerous to persons crossing the street and disagreeable and annoying to those doing business and residing on both sides of the plaintiff's track.

In the first place the plaintiff's track is not a public street, although there is a public street partly on the right of way on both sides the track. The plaintiff was chartered by the General
107 Assembly before the defendant, and acquired its right-of-way and built its road some years before the defendant became a municipality.

In the second place operating a railroad, whether in moving its trains or in switching its cars, is a lawful business, and a business properly conducted under the sanction of law cannot be a nuisance per se, as is held by the Supreme Court in Transfer Co. v. Chicago, 99 U. S. 640. It is said in that case: "A legislature may and often does authorize and even direct acts to be done which are harmful to individuals, and which, without authority, would be nuisances; but in such a case, if the statute be such as the legislature has power to pass, the acts are lawful, and are not nuisances, unless the power has been exceeded."

In the case of Atchison, T. & S. F. Ry. Co. v. Armstrong (Kan.), 80 Pac., 978, the Court says that an authorized business properly conducted at an authorized place is not a nuisance, for whatever is lawful cannot be wrongful. To same effect is Cooley on Torts, p. 67.

It was held in Drake v. R. R., 7 Barb. 508 that a railroad passing through streets in New York City when the cars were drawn by steam power, into a crowded part of the city was not per se a nuisance. Similar decisions are Railroad v. Applegate, 8 Dana 289; Moses v. R. R., 21 Ill. 516; Murphy v. R. R., 21 Ill. 516.

In Yates v. Milwaukee 77 U. S. 498 the Supreme Court of the U. S. holds that "The question of nuisance or obstruction must be determined by general and fixed laws, and it is not to be tolerated that the local municipal authorities of a city declare any particular business or structure, a nuisance, in such a summary mode, and enforce its decision at its own pleasure." In that case Mr. Justice Miller says: "This would place every house, every business, and all the property of a city at the uncontrolled will of temporary local authorities."

In commenting on the powers of municipal corporations to declare what is a nuisance Smith in his Modern Law of Municipal Corporations, Vol. 2, Section 1106, says, that "the city counsel may not, by a mere resolution or motion, declare any particular thing a nuisance which has not theretofore been pronounced to be such by law, or so adjudged by judicial determination."

In a note to the above is the following: "In Chicago Etc.
108 R. Co. v. City of Joliet, 79 Ill., 25, an action by the city to enjoin the railroad company from running its trains through the public streets and over certain public grounds of the city, which the city council by ordinance has declared to be a nuisance, the Supreme Court of Illinois reversed the Court below, which had granted the injunction, and remanded the case with directions to dismiss the bill declaring that they would regard the ordinance as without effect upon the case, although the charter conferred upon the common council the power to abate and remove nuisances, and to punish the authors thereof, and to define and declare what shall be deemed nuisances, upon the authority of Yates v. Milwaukee, 10 Wall, 497, and State v. Mayor, etc., 29 N. J. Law, 170.

This is not only the universal doctrine in this country but is so held in England—Ry. Co. v. Brand, 4 Eng. & Ir. App. 171-196 in which case it is said that "No court can treat that as a wrong which the Legislature has authorized."

In the case of New Orleans v. Lenfant, 126 La. No. 17995—52 So. Rep. 575 it is held that "An ordinance which absolutely prohibits the doing of things, upon property which appears to be the subject of private ownership, which are harmless, in themselves, and may or may not become nuisances, according to the manner in which they are done, is unconstitutional, because it seeks unduly to regulate and trammel the use of such property; and where it imposes arbitrary and unreasonable obligations it is illegal, for that reason." In that case the City of New Orleans by ordinance undertook to prohibit the Railway Co. from parking its cars on its own tracks on Elysian Fields Street and the ordinance was held to be an infraction of the Company's chartered rights.

This principle is clearly recognized and enforced by this Court in Thomason v. R. R., 142 N. C. 318 wherein it is held "When a R. R. Co. acquires a right-of-way, in the absence of any restrictions either
in the charter or the grant, if one was made, it becomes in-
109 vested with the power to use it, not only to the extent necessary to meet the present needs, but such further demands as may arise from the increase of its business and the proper discharge of its duty to the public.

A railroad company may, if necessary to meet the demands of its enlarged growth, cover its right-of-way with tracks and, in the absence of negligence, operate trains upon them without incurring, in that respect, additional liability either to the owner of the land condemned or others."

In Taylor v. Railway 145 N. C., 400 it is held that the lawful operation of a railway on its own right-of-way and premises cannot be an actionable nuisance, the court saying that "the several acts charged against the defendant are well within its chartered powers, provided they are performed with reasonable care."

In Morgan v. R. R., 98 N. C. 247 this Court recognized the right — a R. R. Co. to move its engines and cars at will when necessary on its tracks along the streets of an incorporated town, Mr. Justice Merrimon saying: "The defendant certainly had the right on its roadway to move its locomotive with or without cars attached to it, in the orderly course of such work, to and fro in making up its trains, detaching cars from one already formed and shifting them from one train or place to another."

There is nothing in the R. R. v. Baptist Church case, 108 U. S. 317, which contravenes this principle as is pointed out in Taylor v. R. R. supra and in R. R. v. Armstrong 80 N. W. 980. The railroad company had built a round house and shops for storing, cleaning and repairing its engines up against a church and the Supreme Court sustained a recovery upon the ground that the right given by Congress to enter the City of Washington did not authorize it to purchase a lot and build round houses and shops at any place it should select, the court saying: "As well might it be con-
110 tended that the act permitted it to place them immediately in front of the President's house or of the Capitol."

In commenting upon that case the Supreme Court of Kansas says: "The plaintiff was permitted to recover, but it was because the company had no authority to build its engine house at the place where it did." Railroad v. Armstrong, Supra.

In our case the plaintiff has the right to use its tracks, granted by the Legislature in 1845, for all purposes incident to its business as a common carrier. The movement of detached cars and shifting engines is as necessary to enable the plaintiff to discharge its public duties as is the running of its freight and passenger trains.

The plaintiff's freight depot is at the southern end of Goldsboro and those of two other railroad companies are at the north end and the tracks over which shifting is prohibited for twenty hours out of twenty four connects the respective freight stations.

There must be a frequent shifting and transfer of cars from one carrier to the other, absolutely essential in the transportation of freight. To restrict the use of this track to four hours per day and to undertake to fix shifting limits is practical confiscation of plaintiff's chartered rights.

It is suggested that the railways can run their shifting engines and cars around the city of Goldsboro on a track constructed in recent years. This track runs through a passenger station and is used for the passage of the numerous trains of the three railways that enter Goldsboro.

It may be impracticable and dangerous to have such track used hourly by switching engines. That is a matter that must of necessity be left to the officials of the railways when they are acting within the powers conferred by the General Assembly. They are the persons to whom the law must look for the proper conduct of the business of the company and upon whom rests the burden of responsibility.

111 Whatever power the Legislature may have in the premises it has not in my opinion conferred it upon the defendant, and therefore those ordinances are void.

In this age common carriers are held to the strictest rules and regulations especially in the movement of freight. Heavy penalties are denounced against them for unreasonable delay. If the railroad companies are to be hampered and restricted in the legitimate exercise of their chartered rights by all sorts of regulations enacted by the municipalities through which their roads are laid, it will be impossible for them to discharge the public functions for the performance of which they were chartered.

Mr. Justice Walker concurs in this opinion. Mr. Justice Allen did not sit.

112 *Judgment.*

This cause came on to be argued upon the transcript of the record from the Superior Court of Wayne County: Upon consideration whereof, this court is of opinion that there is no error in the record and proceedings of said Superior Court. It is therefore considered and adjudged by the court here, that the opinion of the court, as delivered by the Honorable Walter Clark, Chief Justice, be certified to the said Superior Court, to the intent that the judgment be affirmed. And it is considered and adjudged further that the plaintiff and surety do pay the costs of the appeal in this court incurred, to-wit, the sum of Twenty 25/100 Dollars ($20.25) and execution issue therefor.

113 Supreme Court of North Carolina.

I, Thos. S. Kenan, Clerk of the Supreme Court of North Carolina, do hereby certify the foregoing to be a full, true and correct copy of the record on file in this court in the case of the Atlantic Coast Line Railroad Co. against The City of Goldsboro, as appears from original on file in this court. Given under my hand and seal of court on this 2nd October, 1911.

[Seal of the Supreme Court of the State of North Carolina.]

THOS. S. KENAN,
Clerk Supreme Court N. C.

Endorsed on cover: File No. 22,899. North Carolina Supreme Court. Term No. 112. Atlantic Coast Line Railroad Company, plaintiff in error, vs. City of Goldsboro, North Carolina. Filed October 9th, 1911. File No. 22,899.

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Supreme Court of the United States.

OCTOBER TERM, 1913.

No. 112.

ATLANTIC COAST LINE RAILROAD COMPANY,
PLAINTIFF IN ERROR,

vs.

CITY OF GOLDSBORO, NORTH CAROLINA,
DEFENDANT IN ERROR.

IN ERROR TO THE SUPREME COURT OF THE
STATE OF NORTH CAROLINA.

Brief for Plaintiff in Error.

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ATLANTIC COAST LINE RAILROAD COMPANY,
PLAINTIFF IN ERROR,

vs.

CITY OF GOLDSBORO, NORTH CAROLINA,
DEFENDANT IN ERROR.

In Error to the Supreme Court of the State of North Carolina.

Brief for Atlantic Coast Line Railroad Company,
Plaintiff in Error.

STATEMENT OF FACTS.

The Wilmington and Raleigh Railroad Company was chartered by the General Assembly of North Carolina in 1833. Various amendments to the charter were passed, whereby among other things, the name of the Company was changed to Wilmington and Weldon Railroad Company, and thereafter, by successive acts, the Atlantic Coast Line Railroad Company, plaintiff in error herein, became the owner of, and entitled to the franchises and rights of the Wilmington and Raleigh Railroad Company. (Findings of fact by Superior Court, in judgment. Printed Record, page 67).

Under the powers conferred by the Charter, the Wilmington and Raleigh Railroad Company, constructed its railroad from Wilmington, North Carolina, to, and into Wayne County, North Carolina, said road passing through that part of the county which, later, was incorporated as the Town of Goldsboro.

The right of way of the company through the lands subsequently occupied by the Town of Goldsboro, North Carolina, was a strip one hundred and thirty (130) feet wide, extending sixty-five (65) feet on each side of the track, and was acquired by deeds, conveying title in fee simple, and by condemnation. (Printed Record. Deeds pps. 34, 35, 37, 38, 39. Condemnation Proceedings, p. 42-46. Find-

ing of fact in Superior Court, (Judgment, p. 67). The charter of the railroad provided that lands condemned should be held as in fee simple. (Printed Record, p. 51).

About seven years after this right of way was acquired, and after the railroad was built and in operation, the Town of Goldsboro, having grown up along the railroad, was incorporated. This was in 1844. (Judgment Superior Court, p. 67).

The town naturally grew along the railroad, and the right of way not occupied by tracks, was used by the citizens. In laying off the town, this right of way was designated as a street, one hundred and thirty (130) feet wide, running approximately North and South, through the town. That portion of the right of way lying East of the tracks was designated East Center Street. The portion to the West of the tracks was designated West Center Street. A number of cross streets were laid out, including streets named Elm, Pine, Spruce, Chestnut, Walnut, Mulberry, Ash, Oak, Beech, Vine and Holly streets, respectively. (Printed Record, p. 54, Aff. of H. Castex, et als).

The Railroad did not make any objection to the use of its right of way as aforesaid. The city has never condemned said right of way, nor any of it, nor has it paid the railroad any compensation for the use of said right of way. (Printed Record, p. 18. Sec. 14 of Answer). Under the law in North Carolina, a railroad may not be barred of its rights of way by adverse user. (Printed Record, p. 34. Code Sec. 150. Rev. 1908, Sec. 388).

The charter of the Town of Goldsboro was amended, and the name changed to City of Goldsboro, by the Legislature of North Carolina.

During the years since the creation of Goldsboro, numerous industries have located along East and West Center streets, so-called, and in addition to its use as part of the main line of the railroad, the track along said street has been used in shifting cars into and out of said industries, and also for reaching the freight terminals of two other railroads entering the town. A belt line was built around the city, over which through passengers and some freight trains are moved, but the use of the old main line for connecting with other terminals, for shifting cars into industries and loading tracks located on its said right of way, and for

passage of certain of its trains is still essential to the Railroad Company, plaintiff in error herein.

In November, 1909, the City of Goldsboro, duly adopted certain ordinances, effective that year, which, among other things, purported to prohibit the railroad:

(1.) From doing any shifting within the four blocks, between Spruce and Ash Streets;

(2.) except between six-thirty and eight-thirty o'clock A. M., and four-thirty and six-thirty P. M.; also

(3.) forbidding the company to stand any car on its track, located on said right of way in said four blocks, for a longer period than five minutes.

(4.) said ordinance also required the Railroad to change the grade of its track, and to fill in between its rails, not only at street crossings, but throughout the entire length of its right of way from Walnut to Vine Streets, a distance of five blocks, so as to make the space between the rails conform to the grade of the city streets. Penalty for violation of any of the provisions of the ordinances was fixed at fifty dollars ($50.00).

On November 19th, 1909, the Atlantic Coast Line Railroad Company sued out a summons in an action for an injunction, in the Superior Court of Wayne County, North Carolina, against the City of Goldsboro, seeking to restrain enforcement of said ordinance.

A temporary restraining order was issued November 20th, 1909, restraining the city from enforcing the said ordinance. (Record, p. 15-16).

The temporary restraining order was dismissed at hearing, and upon appeal, the Supreme Court of North Carolina, by a divided opinion of two to two, (Justice Allen not participating) affirmed the lower Court.

From that judgment, the case is brought to this court on writ of Error.

QUESTIONS INVOLVED.

Upon these facts, the following questions arise for determination:

(1.) **HAS THE RIGHT OF WAY OF THE PLAINTIFF IN ERROR BECOME A STREET OF THE CITY OF GOLDSBORO?**

Assignment of Error, No. 5, (p. 4).

(2.) **HAS THE CITY POWER TO PREVENT USE OF THE FRANCHISE AND PROPERTY OF PLAINTIFF IN ERROR BY ORDINANCE?**

Assignment of Error No. 3.

(3.) DOES AN ORDINANCE PROHIBITING LEGALIZED USE OF ITS PROPERTY BY PLAINTIFF IN ERROR, AMOUNT TO A TAKING OF SUCH PROPERTY WITHOUT DUE PROCESS OF LAW AND WITHOUT JUST COMPENSATION, AND IMPAIR THE OBLIGATION OF THE CONTRACT GRANTING SAID PLAINTIFF IN ERROR ITS FRANCHISE?

Assignments of Error, Nos. 1, 2 and 4.

(4.) IS PLAINTIFF IN ERROR ENTITLED TO EQUITABLE RELIEF?

Assignment of Error, Nos. 6 and 7.

Memoranda

It is proper to call to the attention of the court, at this point, that plaintiff in error makes no question as to the City's right to use those portions of its *cross streets*, where same extend over or across its right of way, and that the company has fully and in good faith, carried out the terms of the ordinance as to grading said *crossings*, and otherwise. The contentions, or questions noted, apply to those portions of the right of way, located *between* said cross streets.

Counsel for plaintiff in error further think that it is appropriate, at this point, to state to this court, in order to avoid misunderstanding that they do not undertake to criticize or take exception to that portion of the opinion of the Chief Justice of the Supreme Court of North Carolina in this case, which deals with the right of the City to require change of grade of a *street crossing* over the track, and right of way of a railroad company.

Plaintiff in error takes exception, not so much to the law laid down in the opinion of the Chief Justice, which was the ruling opinion of the case, as to its application to the facts in this case, for that, after considering the law applicable to street crossings, the opinion of the Chief Justice sustains the validity of the entire ordinance, without reference to those portions which deprive the plaintiff in error of its right to use its right of way between the street crossings, and also prohibit it from using it at all for shifting or standing cars, for loading or unloading.

The attention of this Court is also called to the fact that the Supreme Court of North Carolina was evenly divided on this case. Plaintiff in error respectfully submits that the concurring opinion of Justices Brown and Walker states the proper law of the case, because it recognizes the

fact that the action of the court below, in dismissing the action and refusing to issue the injunction, in effect deprives this plaintiff of its property without due process of law, and impairs the obligation of the contract existing between this plaintiff in error and the State of North Carolina.

The questions arising in this case, aforesaid, are raised here upon the following:

ASSIGNMENTS OF ERROR.

First: That the said ordinance establishing shifting limits, beyond which the plaintiff in error could not operate its shifting engines and cars upon its own tracks, located on its own property, through the City of Goldsboro, was in violation of the provisions of Section 10 of Article I of the Constitution of the United States, in that it impaired the obligation of the contract made between the plaintiff in error and the State of North Carolina, upon the granting of the charter to the Wilmington and Raleigh Railroad Company, whereby said Railroad Company was granted the right to exercise its franchise, and to operate trains and engines over its tracks, and that the Supreme Court of North Carolina was in error in holding that said ordinance was not contrary to said Section 10 of Article I of said Constitution.

Second: The said Supreme Court erred in holding that the ordinance of the City of Goldsboro, prohibiting the plaintiff in error from operating its shifting engines and cars over certain portions of its track in the City of Goldsboro, except between the hours of 6:30 and 8:30 A. M., and 4:30 and 6:30 P. M., did not impair the obligation of the contract, between the said Railroad Company and the State granting its franchise, in violation of the provisions of Section 10, Article 1, of the Constitution of the United States, and did not amount to the taking of its property, contrary to the provisions of the Fourteenth Amendment of said Constitution.

Third: The said Supreme Court erred in holding that the ordinance of the City of Goldsboro, prohibiting the plaintiff in error from placing or standing any cars for a longer period than five minutes on its tracks in the City of Goldsboro, between Spruce and Ash Streets, was not contrary to the provision of Section 10, Article 1, of the Constitution of the United States, and the provisions of the

Fourteenth Amendment to said Constitution, in that said ordinance impaired the obligation of the contract, and deprived said plaintiff in error of its property without due process of law.

Fourth: The said Supreme Court erred in holding that the ordinance of the City of Goldsboro, requiring the plaintiff in error to lower its tracks, located on its right of way, purchased in fee simple, so as to conform to the grade of what is known as East and West Center Street, in the City of Goldsboro, and to fill in said tracks between the rails, was not contrary to the provisions of the Fourteenth Amendment of the Constitution of the United States, and in holding that said ordinance did not deprive plaintiff in error of its property without due process of law, and without adequate compensation therefor.

Fifth: The said Supreme Court erred in holding that under the record in this cause, and the Constitution and laws of the United States relating thereto, that the right of way of the plaintiff in error was a public street.

Sixth: The said Supreme Court erred in holding that under the record in this cause, and the Constitution and laws of the United States relating thereto, that the plaintiff in error was not entitled to equitable relief sought.

Seventh: The said Supreme Court erred in not reversing the judgment of His Honor, Judge Adams, at the hearing in the trial court in this cause, and in not giving to the plaintiff in error its rights under the Constitution and laws of the United States, as the owner in fee simple of the right of way in question, whereon its tracks are located, and whereon it seeks to operate its locomotives and cars as authorized by its charter and the laws of North Carolina.

BRIEF OF ARGUMENT.

1.

RIGHT OF WAY OF PLAINTIFF IN ERROR IN GOLDSBORO, NORTH CAROLINA, IS NOT A STREET.

Raised by Assignment of Error No. 5.

It appears from findings by the Court below that the entire 130 foot strip constituting the right of way was acquired by deed of bargain and sale, and by condemnation before the Town of Goldsboro came into being, and was

held by the predecessors of this plaintiff in error, practically in fee simple.

Revised Code of North Carolina, Chapter 65, Section 23, provided:

"23. No railroad, plank-road, turnpike, or canal company shall be barred of, or be presumed to have conveyed, any real estate, right of way, easement, leasehold or other interest in the soil, which may have been condemned or otherwise obtained for its use, as a right of way, depot, station-house, or place of landing, by any statute of limitation, or by occupation of the same by any person whatever. But all such property shall be and remain, and be deemed and held to be, the property, estate, and right of such company, according to the terms of its charter, until it may be shown, that the same has been departed with, by some writing duly executed by such company to convey the title thereof, from and out of said company."

This became law in North Carolina in 1854, five or more years prior to the beginning of any use of said right of way. as a street (Judgment printed Record, p. 67). The principle has been brought forward in the several Codes of North Carolina, and now appears as Section 388, of the Revisal of 1908, North Carolina. See also Code 1883, Section 150.

Under this law, the City can only claim title to this land "by some writing duly executed" by the plaintiff in error, or its predecessors, or by condemnation.

There is no evidence of any deed or other writing. There is likewise no evidence of condemnation. There is, on the contrary, a specific admission in the pleadings, (Answer, Section 14, Record, p. 18) that no compensation has ever been paid by the City, or Town, for said right of way, used by it as a street.

The record, therefore, shows that the City has no title to this property unless by adverse use and possession.

Under the law of North Carolina in 1844, twenty-one years open, notorious and adverse possession, under known boundaries, was necessary to establish a title by adverse possession. (Revised Statutes of 1837, Chapter 65, Section 2).

Therefore, no title was acquired prior to 1856, for the Town only came into existence in 1844—twelve years before that date. Section 23, of Chapter 65, of the Revised

Code, quoted above, being remedial, became operative at that date (1854), and declared as the policy of the law in North Carolina, that no railroad should be deprived of its right of way by adverse use.

Inasmuch as there is no deed, and, admittedly, no condemnation, and, as under the statutes of the State, title by adverse possession was not to be legally obtained, it is respectfully asserted that the right of way originally purchased, and condemned by the Wilmington and Raleigh railroad, is still the property of plaintiff in error, and is not a street of the City of Goldsboro.

This conclusion is supported by the authorities of the States and of the Supreme Court of the United States, in several similar cases. The Supreme Court of North Carolina, in other cases, has so held:

In the case of *Muse vs. Railroad,* 140 North Carolina, 443, it is said:

> "The railroad owns its right of way as a necessary means of discharging its duty as a common carrier to the public, and cannot dispose of it, or by a permissive user as a passway, confer any rights upon the public inconsistent with the purposes for which it has been acquired, by any of the methods known to the law or named in the charter. The right of way is dedicated to the public use. It is for this reason protected by law against adverse or permissive possession of its right of way."

Again, in the case of *Olive vs. Railroad,* 142 North Carolina, 257, a portion of the right of way had been converted into a garden and yard, by owner of adjoining land, and had been so used for many years. Neither the garden nor yard could have been condemned as a right of way at first. But it was held that the permissive use of said right of way for this purpose did not estop the railroad from reclaiming the same when, in the opinion of the Railroad they were necessary for the use of the Company. The Court noted that the statute expressly provides that the Company cannot part with any of its property, except by some writing duly executed by said Company to convey the title thereof from and out of said Company, and that to allow the plaintiff to part with any of its property by equitable estoppel would be to allow it to do that by indirection which it is expressly forbidden to do directly.

In the case of *Southern Kansas Railway Company vs. Oklahoma City*, Oklahoma, 69 Civil Appeal, 1050, it was held that the city could not appropriate the right of way of a railroad without condemnation proceedings even for a street crossing, where it would require the railroad to go to some trouble and expense to change its tracks.

In the case of *Ga. R. & B. Company vs. Town of Union Point* (Ga.), 47 South Eastern Rep., 183, it was held that the town could not open up a street across a railroad track without condemning it and making compensation therefor.

In the case of *Town of Poulan vs. Atlantic Coast Line*, (Ga.), 51 South Eastern Rep., 657, the same thing was held.

In Smith's Modern Law of Municipal Corporations, Vol. 2, Section 1190, it is said: "The city acquires no title to the bed of the street until it has been rightly condemned as a public highway, and the amount of damages awarded therefor to the owner has been paid or tendered by the authorities."

In Baldwin's American Railroad Law, at pages 448 and 449, it is said:

> "The inability of a railroad company, without statutory authority to that effect to sell its franchise or any part of it, extends to whatever of its real property is essential to the exercise of the franchise. The franchise was vested in certain particular individuals for public purposes. The property was acquired under the franchise and as without it the franchise cannot be fully exercised, to dispose of it would necessarily tend to defeat the public purpose."

Again, the same author, at page 449, says:

> "So a grant of a right of way for railroad purposes to a railroad company and its assigns conveys nothing which it can assign to any party not having a franchise to use the land in the same way and nothing which could be taken on execution by its creditors."

This doctrine is supported by the opinion of this Court, in the case of *East Alabama Railway Company vs. John* Doe, 114 U. S., 340, Law Ed., Book 29, page 136.

In this case the right of way was conveyed to the railroad by deeds. V., a judgment creditor of the corporation, levied execution on the right of way and purchased

the same and took deed and possession. Afterwards he contracted with another railroad corporation to complete the grading of the line of road for so much per mile and on being paid therefor to transfer all his title to the franchise, right of way and property of the old corporation. He completed the work, but was not paid in full and gave possession of the road in 1871 to the corporation, and its franchise and road and property passed in 1880 to another corporation, the defendant against whom V. brought an action of ejectment to recover the road bed; Held (1.) The right of way could not be sold on execution or otherwise to a purchaser who did not own the franchise.

The Court at page 140 of the Law Edition, says:

"The corporation could not have made a valid conveyance of the right of way severed from its franchise. What it acquired is merely an easement in the land to enable it to discharge its function of making and maintaining a public highway, the fee of the soil remaining in the grantor. By the terms of its charter, therefore in connection with the terms of the deeds, of the right of way, that right was indissolubly linked to the franchise, and the purpose of the existence of the corporation and to its public functions, so long as they should exist."

In the case of *Donahue vs. State*, 112 New York, 142 where the State had built a feeder of the Champlain canal, running through the town of Cohoes. This was covered with plank, which were covered several feet with dirt, and it was used as a highway for more than twenty years, but it had never been laid out by any municipal authority as a highway. The plaintiff fell through this covered way and was injured on account of the plank being decayed. It was held that he was not entitled to recover; that a legal dedication of the land as a public highway coud not be inferred on the theory of presumption, as that must depend upon a supposed grant, and a grant may not be presumed, where it would have been unlawful, the Court saying at page 145:

"The land in question was the property of the State, and as such was appropriated for the use described as a feeder to the canal, and never could have become the subject of any grant for the purpose of a public highway. The most that can be said of appellants' contention is that the State suffered the use of this strip of its canal

for purposes of passage over or upon it; but it was merely by sufferance that it was so used, and not by any agreement or permission. Nor did the State owe any active legal duty to protect those who made use of its land."

In the case of *Northern Pacific Railway Company*, plaintiff in error, against *Abner Townsend*, 190 U. S., 267; Law. Edition, Book 47, 1044, it was held that adverse possession of a right of way could not ripen into a title as against the Railroad; the Court saying at page 1047 in the Law, Edition, 271 of the regular edition:

"Manifestly, the land forming the right of way was not granted with the intent that it might be absolutely disposed of at the volition of the Company.____This being the nature of the title to the land granted for the special purpose named, it is evident that, to give such efficacy to a statute of limitations of a State as would operate to confer a permanent right of possession to any portion thereof upon an individual for his private use would be to allow that to be done by indirection which could not be done directly; for, as said in *Grand Trunk Railroad Company vs. Richardson*, 91 U. S., 454, 468, 23 Law, Ed., 356, 361, 'a railroad company - - - is not at liberty to alienate any part of it so as to interfere with the full exercise of the franchise granted.' "

The Court goes on further to say that it cannot be said that 400 feet right of way was not necessary as the government had considered that width necessary to the performance of the duties of the railroad.

The Supreme Court of Nebraska in the case of *McLucas and others vs. St. Joseph and G. I. R. Company*, 93 N. W. Rep., 928, holds that title to a portion of the right of way of a railroad cannot be gained by adverse possession. In support of this doctrine the court cites opinions from the highest courts of Tennessee, of Washington, of Kansas, of North Carolina and of California.

There is, of course, some conflict in the authorities throughout the country as to whether title to land dedicated as a right of way for a railroad can be obtained by adverse possession in the case of crossings for streets or roads. But, as noted, the authorities, both State and Federal, seem to agree that no assumption can be presumed, or title acquired to a right of way by occupancy for any length of time longitudinally with the railroad, by reason of the fact that the

Railroad has not power to convey away its right of way, except, perhaps, for the purposes of such a highway crossing as herein mentioned. As noted in a memorandum attached to the questions involved in this Argument, this plaintiff in error now makes no claim against the City's right to use the crossings which have been established and used over and across this right of way as streets for a number of years past. Whatever may be the true doctrine of the law, this Company has no desire to interfere with the proper use of the streets of the City, and it has heretofore, since the passage of this ordinance, changed the grade of its road across said street crossings, and has graded and paved the same as required by the terms of the ordinance, and is otherwise complying with the terms of the ordinance as to said street crossings. The contention hereinbefore made referred to those portions of the Company's right of way embraced between the successive street crossings, running longitudinally through the City of Goldsboro, these being the portions which the City claims constitute East and West Center Street.

In addition to the authorities heretofore cited to support the title of the plaintiff in error to its right of way through the Town of Goldsboro, the plaintiff in error also says that the defendant City is estopped to deny its title. This allegation is made upon the facts appearing in the record in the shape of a record of a former suit between this plaintiff in error and this defendant, to-wit: *City of Goldsboro vs. Atlantic Coast Line Railroad Company* (see printed record, pages 25 to 34, inclusive). This was an action brought by the City of Goldsboro on March 22, 1907, against this plaintiff in error, in the Superior Court of Wayne County, North Carolina, to enforce the payment of certain claims for paving assessments, which claims were based upon the allegation that East and West Center Streets adjoined the road-bed of this plaintiff in error, and ran parallel with said road-bed from the beginning to the end of said streets, and that therefore, under the ordinance in question, this plaintiff was an abutting land owner, and owed the City the sum of Six Hundred and Ninety Dollars and Three Cents ($690.03) as its proportion of the cost of paving under said ordinance. As appears in the record, this cause came on for trial at the August term, 1909, of the Superior Court of Wayne County, North Carolina, when it was adjudged

on the statement of facts agreed in that case, that the plaintiff in error in this case, to-wit: Atlantic Coast Line Railroad Company, was the owner of its right of way, and that the use of the said right of way by the City of Goldsboro had been subservient to the rights of the said plaintiff in error, Atlantic Coast Line Railroad Company, and that said right of way was not a street of said City.

Thus, in a proceeding between the same parties, involving exactly the same point, it has heretofore been agreed and adjudicated by the Superior Court of Wayne County, North Carolina, that this particular property is the right of way of the Atlantic Coast Line Railroad Company, plaintiff in error herein, and is not a street of the City of Goldsboro. It is, therefore, asserted that the City of Goldsboro is now estopped to deny the title of the Atlantic Coast Line Railroad Company, plaintiff in error herein, to said right of way; and that the right of way of the plaintiff in error throughout the Town of Goldsboro, known in said Town as East and West Center Streets, is still the property of the Atlantic Coast Line Railroad Company, plaintiff in error herein, and is not a Street of the City of Goldsboro.

II.

HAS THE CITY OF GOLDSBORO POWER TO PREVENT THE USE OF THE FRANCHISE AND PROPERTY OF THE PLAINTIFF IN ERROR, BY ORDINANCE.

(Raised by Assignments of Error No. 3.)

It is admitted in this case that the plaintiff in error was rightfully and properly chartered by the State of North Carolina to build, construct and operate a railroad, and that it duly and lawfully acquired its right of way under the powers granted to it by the Legislature, and built thereon its track, and has been conducting its railroad thereupon. The question now presented is whether the City of Goldsboro, a municipal corporation exercising certain powers by virtue of the grant to it by the Legislature of North Carolina, has the right to stop the plaintiff in error in the exercise of the franchises granted to it, or in the use of the property acquired under said franchises by it, by the passage of a municipal ordinance forbidding the same. The only express powers conferred upon the City of Goldsboro, by its charter, as appears from the sections introduced, and made

a part of the record in this case, are as follows, in so far as they apply to the regulation of railroad companies, or to this case:

Section 27, (Printed Record, page 59), gives the Board power to suppress and remove nuisances and gives the City a right to drain its streets.

Section 37, of the Charter, (Printed Record, page 59) gives the Board power to lay off streets, and to condemn same.

Section 48, (Printed Record, page 60), authorizes the aldermen to compel the abatement and removal of all nuisances within the City, at the expense of the persons causing the same.

Section 55, (Printed Record, page 60), gives the Board of Aldermen power to regulate the speed of trains while running within the corporate limits of the City, and to prohibit the ringing of bells, blowing of steam whistles, either during the day or night, within the city limits.

Inasmuch as the Railroad Company, plaintiff in error herein, has already made the changes in grade required by the City at the point where its cross-streets go across the right of way aforesaid, and has made no point as to those portions of the ordinance which regulate the speed of trains within the city limits, it remains to consider, under this section, only the question of whether the foregoing authority conferred upon the City, gives it the right, (1) to prohibit the said Railroad from doing any shifting upon its tracks, between Spruce and Ash Streets, except between six-thirty and eight-thirty in the morning, and four-thirty and six-thirty in the afternoon; and also (2) whether it has the power to forbid the said Railroad Company to stand any car on its said track for a longer period than five minutes; and whether it has, (3) the power to require of the Railroad that it change the grade between street crossings, and fill in between the said tracks, and pave the same, so that they may be used for street purposes.

The only specific power appearing in the charter of the City of Goldsboro, as quoted in the record in this case, which could be taken as authority for its action in passing said ordinances, is that portion of the charter which gives it the right to compel the abatement and removal of nuisances. As noted in the concurring opinion of Justices

Brown and Walker, the City's counsel below in this case, base the right to enact the switching ordinances upon the police power of the City, contending that it is *per se* a nuisance to conduct such operations on a public street, because dangerous to persons crossing the street, and disagreeable and annoying to those doing business and residing on both sides of the plaintiff's track. The concurring opinion then holds that the plaintiff's track is not a public street, which is the conclusion submitted to this Court in the first section of this argument. The following portion of the opinion constitutes so forcible an argument on the exact point here under consideration that the plaintiff in error begs leave to adopt it as its brief in this case. The opinion proceeds:

> "In the second place, operating a railroad, whether in moving its trains or in switching its cars, is a lawful business; and a business properly conducted under the sanction of law cannot be a nuisance per se, as is held by the Supreme Court in Transportation Company vs. Chicago 99 U. S. 640. It is said in that case: 'A Legislature may and often does authorize and even direct acts to be done which are harmful to individuals, and which, without authority, would be nuisances; but in such a case if the statute be such as the Legislature has power to pass, the acts are lawful, and are not nuisances, unless the power has been exceeded.'
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> In the case of *Atchison, T. & S. F. Ry. Co. vs. Armstrong* (Kan.), 80 Pac., 978 the Court says that an authorized business propertly conducted at an authorized place is not a nuisance, for whatever is lawful cannot be wrongful. To same effect is Cooley on Torts, P. 67.
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> It was held in *Drake vs. R. R.*, 7 Barb. 508 that a railroad passing through streets in New York City, when the cars were drawn by steam power, into a crowded part of the City, was not per se a nuisance. Similar decisions are I*Railroad vs. Applegate*, 8 Dana 289;*Moses vs. R. R.*, 21 Ill., 516; *Murphy vs. R. R.*, 21 Ill. 516.
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> In *Yates vs. Milwaukee* 77 U. S. 498, the Supreme Court of the United States holds that 'The question of nuisance or obstruction must be determined by general and fixed laws, and it is not to be tolerated that the local municipal authorities of a city? declare any particular business or structure, a nuisance in such a summary mode, and enforce its decision at its own pleasure.' In that case Mr. Justice Miller says: 'This

would place every house, every business, and all the property of a city at the uncontrolled will of temporary local authorities.'

In commenting on the powers of municipal corporations to declare what is a nuisance Smith in his Modern Law of Municipal Corporations, Vol. 2, Section 1106, says, that 'the city counsel may not, by a mere resolution or motion, declare any particular thing a nuisance which has not theretofore been pronounced to be such by law, or so adjudged by judicial determination.'

In a note to the above is the following: 'In *Chicago etc. R. Co. vs. City of Joliet*, 79 Ill, 25, an action by the City to enjoin the Railroad Company from running its trains through the public streets and over certain public grounds of the city, which the city council, by ordinance, has declared to be a nuisance, the Supreme Court of Illinois, reversed the Court below, which had granted the injunction, and remanded the case with directions to dismiss the bill, declaring that they would regard the ordinance as without effect upon the case, although the charter conferred upon the common council the power to abate and remove nuisances, and to punish the authors thereof, and to define and declare what shall be deemed nuisances, upon the authority of *Yates vs. Milwaukee*, 10 Wall, 497, and *State vs. Mayor, etc.*, 29 N. J. Law, 170.'

This is not only the universal doctrine in this country, but is so held in England—*Ry. Co. vs. Brand*, 4 Eng. & Ir. App. 171-196, in which case it is said that "No Court can treat that as a wrong which the Legislature has authorized."

In the case of *New Orleans vs. Lenfant*, 126 La. No. 17,-995-52 So. Rep. 575, it is held that 'An ordinance which absolutely prohibits the doing of things, upon property which appears to be the subject of private ownership, which are harmless, in themselves, and may or may not become nuisances, according to the manner in which they are done, is unconstitutional, because it seeks unduly to regulate and trammel the use of such property; and where it imposes arbitrary and unreasonable obligations it is illegal, for the reason.' In that case the City of New Orleans, by ordinance undertook to prohibit the Railway Company from parking its cars on its own tracks on Elysian Fields Street and the ordinance was held to be an infraction of the Company's chartered rights.

This principle is clearly recognized and enforced in *Thomason vs. R. R.* 142 N. C. 318, wherein it is held 'When a Railroad Company acquires a right of way, in the absence of any restrictions either in the charter or the grant, if one was made, it becomes invested with the power to use it, not only to the extent necessary to meet the present needs, but such further demands as may arise from the increase of its business and the proper discharge of its duty to the public.'

A Railroad Company may, if necessary to meet the demands of its enlarged growth, cover its right of way with tracks and, in the absence of negligence, operate trains upon them without incurring in that respect, additional liability either to the owner of the land condemned, or others.

In *Taylor vs. Railway* 145 N. C., 400, it is held that the lawful operation of a railway on its own right of way and premises cannot be a actionable nuisance, the court saying that 'the several acts charged against the defendant are and well within its chartered powers, provided they are performed with reasonable care.'

In *Morgan vs. R. R.*, 98 N. C. 247, the Court recognized the right of a Railroad Company to move its engines and cars at will when necessary on its tracks along the streets of an incorporated town, Mr. Justice Merrimon saying: 'The defendant certainly had the right on its roadway to move its locomotive with or without cars attached to it, in the orderly course of such work, to and fro in making up its trains, detaching cars from one already formed and shifting them from one train or place to another.'

There is nothing in the *Railroad vs. Baptist Church* case, 108 U. S. 317, which contravenes this principle as is pointed out in Taylor vs. Railroad supra and in Railroad vs. Armstrong, 80 N. W. 980. The Railroad Company had built a round-house and shops for storing, cleaning and repairing its engines up against a church and the Supreme Court sustained a recovery upon the ground that the right given by Congress to enter the City of Washington, did not authorize it to purchase a lot and build round-houses and shops at any place it should select, the court saying: 'As well might it be contended that the act permitted it to place them immediately in front of the President's house, or of the Capitol'

In commenting upon that case the Supreme Court of Kansas says:

"The plaintiff was permitted to recover, but it was because the company had no authority to build its engine house at the place where it did." Railroad vs. Armstrong, Supra.

In our case the plaintiff has the right to use its tracks, granted by the Legislature in 1845, for all purposes incident to its business as a common carrier. The movement of detached cars and shifting engines is as necessary to enable the plaintiff to discharge its public duties as is the running of its freight and passenger trains.

The plaintiff's freight depot is at the southern end of Goldsboro, and those of two other railroad companies are at the north end, and the tracks over which shifting is prohibited for twenty hours out of twenty-four connects the respective freight stations.

There must be a frequent shifting and transfer of cars from one carrier to the other, absolutely essential in the transportation of freight. To restrict the use of this track to four hours per day, and to undertake to fix shifting limits is practical confiscation of plaintiff's chartered rights.

It is suggested that the railways can run their shifting engines and cars around the City of Goldsboro on a track constructed in recent years. This track runs though a passenger station, and is used for the passage of the numerous trains of the three railways that enter Goldsboro.

It may be impracticable and dangerous to have such tracks used hourly by switching engines. That is a matter that must of necessity be left to the officials of the railways when they are acting within the powers conferred by the General Assembly. They are the persons to whom the law must look for the proper conduct of the business of the company, and upon whom rests the burden of responsibility.

Whatever power the Legislature may have in the premises it has not conferred it upon the defendant, and therefore those ordinances are void."

III. and IV.

DOES THIS ORDINANCE EFFECT A TAKING OF PLAINTIFF'S PROPERTY AND FRANCHISE WITHOUT DUE PROCESS OF LAW, AND IMPAIR THE OBLIGATION OF ITS CONTRACT WITH THE STATE?

IS PLAINTIFF IN ERROR ENTITLED TO EQUITABLE RELIEF?

(Raised by Assignments of Error No. 6 and 7.)

These two questions can, we believe, best be considered together.

Justices Brown and Walker, of the Supreme Court of North Carolina, in this case, differing from the Chief Justice, and Justice Hoke, after fully considering the ordinances herein, said:

> "To restrict the use of this track to four hours per day, and to undertake to fix shifting limits, is practical confiscation of plaintiff's chartered rights."

We respectfully add that to require of this plaintiff in error that it lower its track, and fill in between its rails, so as to make the surface conform to a fixed grade line, for four blocks, between cross streets, also amounts to confiscation of its property, in that it attempts to make it a street, for use by vehicles and persons, without due process of law.

We, therefore, assert that the plaintiff in error is entitled to protction of an injunction restraining the enforcement of said ordinances.

Quoting further from the concurring opinion of Justices Brown and Walker, below, it is

> "settled by abundant authority that when it is shown that a municipal ordinance unlawfully interferes with the chartered rights, duties, as well as the business of a common carrier, and will seriously obstruct the carrier in the discharge of its duties to the public, the enforcement of such ordinance will be enjoined."

It is, of course, urged in the argument of this case that injunctive relief may not be had to restrain a criminal prosecution, or enforcement of a criminal ordinance. This is true as a general rule, but is subject to the well recognized exception that when property rights are involved, and enforcement of the ordinance would effect confiscation, the injunction will be, in either case, sustained.

This is sustained by the following authorities, to-wit:

In High on Injunctions, Section 64, bottom of page 87 and top of page 88, it is said:

> "If, however, the act concerning which an arrest or criminal prosecution is threatened, affect civil property and its enjoyment, in protecting the property right, equity may properly enjoin the criminal prosecution, but in such cases its interference is founded solely upon the ground

of injury to property, and the necessity of preserving property rights."

In the case of *City of Atlanta against Gate C. G. L. Co.*, 71 Ga., 106, the complaining company under a charter was proceeding to construct its plant in the City of Atlanta, and the city by an ordinance had forbidden any one to place thrash, timber, etc., in the streets of the city without permission of the Mayor, which permission the mayor would not give the Company. The city was restrained from enforcing the ordinance. The Court at page 126, says:

"That injunction was the proper remedy to restrain the defendant from interfering with, and hindering the prosecution of the complainant, organized under its charter, is evident both upon principle and authority. While a Court of Equity will not interfere with the prosecution of a criminal proceeding, yet, where it is evident that private property and civil rights are invaded by such means, equity will interfere to protect them. On the other hand, where it is manifest, as in this case, that any prosecution and arrest is threatened for alleged violation of a City ordinance for the sole purpose of preventing the exercise of Civil rights conferred directly by law, injunction is the proper remedy to prevent injury to the parties thus menaced."

In Beach on Injunctions, Sec. 60, bottom of page 75 and top of page 76, it is said:

"And doubtless, the qualifications of the rule is as well established as the rule itself: That a Court of Equity, may in a proper case interfere by injunction, to restrain any act or proceeding whether connected with crime or not, which tends to the destruction and impairment of property or property rights."

In Spelling on Injunction and Ex. Rem., Section 24, page 37, it is said;

"But it was held that where criminal proceedings were threatened under cover of an invalid statute for the purpose of impelling relinquishment of property rights, the remedy in chancery was available, and a preliminary injunction might properly be used."

In Lewis on Eminent Domain, Vol. 2, Sec. 631, it is said:

"It is now almost universally held that the entry upon private property under cover of the Eminent Domain

power, will be enjoined until the right to make such entry has been perfected by a full compliance with the Constitution and Law. If just compensation has not been paid, or deposited as required by law, or if the proceeding under which the right to enter is claimed are invalid for any reason, the entry will be enjoined, so if the right to enter is claimed under a statute which is unconstitutional and void, or which does not confer the power of Eminent Domain."

In *Railroad vs. Asheville*, 109 N. C., 688, the City of Asheville granted the Street Railway Company the right to construct a road over a certain street. The city afterwards passed an ordinance revoking the license and commanding the policemen to prevent the railway from using its franchise. The city was restrained. The court, on page 690, in speaking of the powers of the city, says:

"It can pass ordinances and make appropriate regulations and enforce them; establish a police force and employ the same for all lawful purposes and do a multitude of important acts for the protection, convenience, comfort and safety of the people and their property, but it cannot, at its will and pleasure, rid itself of contract obligations and engagements, whether the same concern individuals or other corporations. It is subject to the jurisdiction of the Court in appropriate cases, and it must seek its remedy in like appropriate cases through the courts. It can exercise authority only in the respects and in the way prescribed by law. The rights of the plaintiff were important and concern the public as well as itself. It appears that a principle purpose of the branch road, which it was constructing when interferred with, was to reach important tobacco warehouses, and facilitate the transportation of tobacco to and from them and to extend and enlarge business in that connection and locality. Such enterprises must not be interfered with or retarded for light or trivial causes. The law encourages and will protect just public enterprise, and will interfere to impede or arrest it but in case where good and substantial cause is shown."

In *Olive vs. Railroad*, 144 North Carolina, the Court, on page 264, says:

"It would seem clear that when, as in the case of a railroad company, a right of way is acquired by any of

the statutory methods, or by grant, for the purpose of enabling it to perform its duty to the public, such easement will be protected by injunction. It would be unreasonable to permit a railroad company to acquire a right of way for the purpose of constructing its tracks and necessary buildings, and, when it is invaded, or its enjoyment interfered with, confine the company to an action for damages. In this way, the operation of a railroad might be so much hindered that they would not be able to discharge their public duties, the primary object for which they are chartered. The law has been well stated in Beach Mod. Eq., Sec. 676, "The jurisdiction of a Court of Equity to protect its franchise from unlawful invasion or disturbance by injunction is clearly settled and has been recognized as benign and salutary. The ground of such jurisdiction, is usually, the prevention of irreparable injury; the avoidance of a multiciplity of suits and the abatement of annoyances in the nature of a legal nuisance. Another controlling reason for interference by Equity in such cases, is, that the public at large have an interest in the protection of such a privilege as well as the party interested. And while the Court will not interpose to prevent a mere trespass of an ordinary character, yet, when a trespass or a series of trespasses will operate to destroy or seriously impair the exercise of a franchise, the apprehended injury will be enjoined."

Again, at page 265:

"Injunctive relief against interference with the use of the right of way of a railway company is not given because of any special consideration for these corporations, but because they are public agencies, chartered, organized and given the right of Eminent Domain in contemplation of the law, to serve the public. They are a part of the system of highways of the State. We find no difficulty in holding that the plaintiff is entitled to the injunctive relief against interference with its right of way without regard to the solvency of persons interferring therewith."

Railroad vs. Dunbar, 97 *Ill.*, 571, "And it is settled that Courts of Equity will protect one in the exercise and enjoyment of a quasi-public franchise of this character by process of injunction where the threatened injury is irreparable, or the law inadequate."

In *City of Cleveland vs. Cleveland City Railway Company*, 194 U. S., 517, 48 L. E., 1102, an ordinance of the city was passed reducing the rates on a certain line in the City of Cleveland. One of the head-notes in the case is as follows:

"Equity will entertain jurisdiction of a suit to restrain, as impairing contract obligations, the enforcement of a municipal ordinance reducing the street railway rates on a section only of a consolidated line, in view of the public interests and of the controversies, confusion, risks and multiplicity of suits which would necessarily be occasioned by resistence to the enforcement of the ordinance."

In *Smyth vs. Ames*, 169 U. S., 466; 42 L. Ed., 819, a statute had been passed reducing the rates on the railroads of the State of Nebraska, and it was held that such a reduction was contrary to the Fourteenth Amendment of the Constitution of the United States and that a Court of Equity might restrain the enforcement of the penalties prescribed under such statutes. The Court, at page 839 of the L. E., after referring to the penalties, says:

"Transactions along the line of any one of these railroads out of which a cause of action might arise under the statute, are so numerous and varied that the interference of Equity could well be justified upon the ground that the general decree according to the prayer of the bills, would avoid a multiplicity of suits and give a remedy more certain and efficacious than could be given in any proceeding instituted against the company in a court of law; for a Court of law could only deal with each separate transaction involving the rates to be charged for transportation. The transaction of a single week would expose any company questioning the validity of the statute to a vast number of suits by shippers, to say nothing of the heavy penalties named in the statute. Only a Court of Equity is competent to meet such an emergency and determine conclusions once for all and without a multiplicity of suits, matters that affect, not simply individuals, but the interests of the entire community as involved in the use of a public highway and in the administration of the affairs of a quasi-public corporation, by which such highway is maintained."

Counsel for the defendant in the argument below, insisted that the penalties need not be cumulative; that the plaintiff

need only violate the ordinances once and await for the test of the ordinances in this one case. Any one of the railroads of the State of Nebraska might have followed the same course, but the Supreme Court of the United States did not think it was necessary that they should do so, and held that they were entitled to injunctive relief.

In *Prentiss vs. Atlantic Coast Line*, 214 U. S., 226; 53 L. Ed., the Corporation Commission of Virginia was enjoined from enforcing certain rates that had been fixed for the railroads in that State. On page 159 of the L. E., 228, of the Reg. Ed., the Court says:

> "It seems to us clear that the appellees were not bound to wait for proceedings brought to enforce the rate and to punish them from departing from it. Those, we have assumed in favor of the appellants would be proceedings in Court and could not be enjoined; while to confine the railroad to them for the assertion of their rights would be to deprive them of a part of those rights. If the railroads were required to take no active steps until they could bring a writ of error from this Court to the Supreme Court of Appeals, after a final judgment, they would come here with the facts already found against them."

In *Vicksburg Water Works Company vs. Vicksburg*, 185 U. S., 65; 46 L. E., 808, the City of Vicksburg had made a contract with the plaintiff for a municipal water supply. Afterwards the City passed an ordinance denying its obligations under said contract, and held an election to issue bonds for building a water works in violation of its contract with the plaintiff, and the city was restrained from carrying into effect said ordinance. The Court at page 82 of the Reg. Ed., page 815 of the L. E., says:

> "Whether this act of the Legislature of Mississippi, is, in its terms, subject to those objections or whether it may be regarded as merely authorizing the city to proceed in such a manner as not to conflict with existing contract obligations we need not determine at this stage of the case because we think that the ordinance of the City of Vicksburg, November 7, 1900, whereby the mayor was instructed to notify the Water Works Company that the mayor and aldermen denied any liability upon any contract for the use of the water works hydrants, and the subsequent action of the city of holding an election to

authorize the issue of bonds to buy or construct water works of its own in refusing to pay the amount due and payable under the terms of the ordinance, did not present a mere case of breach of a private contract to be remedied by an action at law, but disclose an intention and attempt, by subsequent legislation, of the city, to deprive the complainant of its rights under an existing contract; and that, therefore, unless the city could point to some inherent want of legal validity in the contract or some such disregard by the Water Works Company of its obligations under the contract as to warrant the city in declaring itself absolved from the contract, the case presented in the bill is within the meaning of the Constitution of the United States and within the jurisdiction of the Circuit Court as presenting a Federal question."

Again, at page 82 of the Reg. Ed., and page 816 of the L. E., the Court says:

"It is, however, contended that the bill does not disclose any actual proceeding on the part of the city to displace the complainant's rights under the contract, that mere apprehension that legal action may be taken by the city cannot be the basis of enjoining such action; and that therefore the Circuit Court did right in dismissing the bill. We cannot accede to this contention. It is one often made in cases where bills of equity are filed to prevent anticipated and threatened action. It is one of the most valuable features of equitable jurisdiction to anticipate and prevent a threatened injury, where the damages would be insufficient or irreparable. The exercise of such jurisdiction is for the benefit of both parties; in disclosing to the defendant that it is proceeding without warrant of law, and in protecting the complainant from injuries which, if inflicted, would be destructive of its rights."

In *Dobbins vs. Los Angeles*, 195 U. S., 223; 49 L. Ed., 169, an ordinance of the city was passed, forbidding the plaintiff to erect gas works within certain territory in which it had been allowed to do so by a former ordinance; this was a writ of error to the Supreme Court of the State of California to review the judgment of that Court upholding said ordinance. It seems that the Supreme Court of California had based its opinion upon the fact that the passage of the ordinance was the exercise of the police power of the

City, which could not be reviewed; and, to sustain said opinion, the Court cited an opinion of Chief Justce Waite of the Supreme Court of the United States. The Supreme Court of the United States, however, in this case, says, at page 235 of the Reg. Ed., and page 175 of the L. E.:

"The observations of Chief Justice Waite in that connection, had reference to the facts of the particular case and was certainly not intended to declare a right of either the Legislature or a City Council to arbitrarily deprive a citizen of rights protected by the Constitution, under the guise of exercising police power, reserved to the States."

Again, at page 236 of the Reg. Ed.:

"The Legislature may not under guise of protecting public interests, arbitrarily interfere with private business, or impose unusual and unnecessary restraint upon lawful occupation. In other words, its determination as to what is the proper exercise of its police power is not final or conclusive, but is subject to the supervision of the courts."

Again, "The question in each case is whether the Legislature has adopted the statute in exercise of a reasonable discretion, or whether its action be a mere excuse for an unjust discrimination, or the oppression or spoliation of a particular class."

Again, at page 237 of the Reg. Ed.:

"The State has undoubtedly the power, by appropriate legislation, to protect the public morals, the public health and the public safety; but if, by their necessary operation its reguations looking to either of those ends, amounts to a denial to persons within its jurisdiction, of the equal protection of the law, they must be deemed unconstitutional and void."

Again, at page 241 of the Reg. Ed., and page 177 of the L. E.:

"It is well settled that where property rights would be destroyed, unlawful interference by criminal proceedings under a void law or ordinance may be reached and controlled by a decree of a Court of Equity."

Ex-parte Young, 209 U. S., Reg. Ed., page 123; 52 L. E., page 614, which was a petition for habeas corpus to release the petitioner from the custody of the United States Circuit Court of Minnesota, who was held for contempt of the re-

straining order issued by said Court against the petitioner to prevent his enforcing the rates prescribed by the law of the State. The court, at page 146 of the Reg. Ed., and page 723 of the L. E., in speaking of the penalties prescribed for the violation of said statutes quotes with approval, the following language from a former decision of the Supreme Court;

"Do the laws secure to an individual an equal protection when he is allowed to come into Court and make his claim or defense, subject to the condition that upon a failure to make good that claim or defense, the penalty for such failure either appropriates all his property or subjects him to extravagant and unreasonable loss?

It is doubtless true that the State may impose penalties such as will tend to impel obedience of its mandates by all, individuals or corporations and if extreme and cumulative penalties are imposed, only after there has been a final judgment of the validity of the statute, the question would be very different from that here presented; but when the Legislature, in an effort to prevent any inquiry of the validity of a particular statute, so burdens any challenge thereof in the courts that the party affected is necessarily constrained to submit rather than take the chances of the penalties imposed, then it becomes a serious question, whether the party is not deprived of the equal protection of the laws."

The Court quotes this language with approval, although the case in which it was delivered, went off on another point.

The Court in speaking of the right to institute proceedings to restrain the execution of an illegal statute before any proceedings to enforce same had been begun, says at page 165 of the Reg. Ed., and page 731 of the L. E.:

"To await proceedings against the company in a State Court, grounded upon a disobedience of the act, and then, if necessary, obtain a review in this Court by writ of error to the highest State Court, would place the company in peril of large loss, and its agents at great risk of fines and imprisonment if it should be finally determined that the act was valid.

"The courts having jurisdiction, Federal or State, should at all times be opened to them as well as to others, for the purpose of protecting their property and their legal rights."

Again, at page 166 of the Reg. Ed. the Court says:

"The proper, if not the only, mode of judicial relief against the tariff of rates established by the Legislature, or its commission, is by a bill in chancery, asserting its unreasonable character; and that until the decree of the Court in such equity suit was obtained, it was not competent for each individual having dealings with a carrier or for the carrier in regard to each indivdual who demands its services, to raise a contest in the courts over the questions which ought to be settled in this general and conclusive manner."

"It is settled,' said the Court in *Southern Express Company vs. Ensley*, 116 Fed., 756, "That a Court of equity should enjoin the enforcement of a municipal ordinance, though violations of it are punished criminally, when its enforcement will affect the illegal destruction of, or a grave interference with a corporate franchise, in the operation of which; the public have an interest."

"Hence the bill alleging that a city is attempting by an ordinance, unlawfully to arrest complainant's employees and to destroy the franchise of the railroad company, will not be dismissed, although it may appear that the ordinance is quasi-criminal." *Mobile vs. Louisville and Nashville Railroad Company* 84 Ala., 115; 5 Am. St. Reports, 324; 4 So., 106.

"Equity will grant an injunction against a criminal proceeding where it is necessary to protect property rights, and threatened prosecution and arrest is for the sole purpose of preventing the exercise of civil rights conferred directly by law, as in case of a city ordinance preventing the running of pipes in the streets without permission, where the gas company has a contract, but permission is refused."

Atlanta vs. Gate City Gas Light Co., 71 Ga., 106.

The principle underlying the case just cited is thus explained by the same court in a later case, "When the damages would be irreparable if the threatened injury is not prevented, Equity, if properly appealed to, will not permit valuable vested corporate franchises granted by the State to be seriously impaired or practically destroyed by prosecution instituted under cover of municipal ordinances which are wrested from their legitimate purposes and fraudulently used in a manner to which they

cannot apply, as a means with which to prevent the exercise of these franchises." *Paulk vs. Sycamore*, 104, Ga., 24; 41 L. R. A., 772; 69 St. Report, 128; 30 S. E., 417.

Directly within the ruling in *Atlanta vs. Gate City Gas Light Co.*, 71 Ga., 106, Supra, is the case of *Georgia R. & B. Ry. Co. vs. Atlanta*, 118 Ga., 486; 45 S. E., 256, where the Court held that injunctive relief against criminal proceedings to enfoce a municipal ordinance against obstructing streets should have been granted on behalf of a railway company, because such proceedings were threatened for the purpose of preventing the company from building a fence with a view to enclosing land which it had permitted the public to use, without intent to dedicate it as a street."

In *Rushville vs. Rushville Nat. Gas Co.* 132 Ind. 575, it was Held that "An injunction may be granted to prevent a city from enforcing an ordinance void as to complainant, by continued arrests and prosecutions—where complainant has a valuable franchise and has expended large sums of money, under a city ordinance and thereafter another ordinance is passed imposing great restrictions and penalties."

"The rule forbidding a Court of Equity to stay criminal proceedings does not apply to a suit for an injunction to restrain the enforcement of an ordinance imposing an unlawful license fee on an Express Company engaged in interstate commerce, under penalty or fine or imprisonment for noncompliance." *So. Exp. Co. vs. Ensley*, 116 Fed:, 756.

In *Mobile vs. L. & N. Railroad Company*, 84 Ala., 115; 5 Amer. St. Rep., 342, in which, under authority from the Legislature, the City of Mobile had authorized the L. & N. Railroad Company to construct its tracks on a certain street with necessary sidings and turn-outs which the company might deem necessary for its business purposes: It is held, that an ordinance of the city forbidding the railroads to unload its cars in said street was void and the City was restrained from enforcing said ordinance. The Court, at page 349, of the Amer. St. Rep., says:

"The jurisdiction of a Court of Equity to protect a franchise of this kind from unlawful invasion or disturbance, is clearly settled and has been often recognized in this Court as benign and salutary. The value of such

a right, or the cost of its unlawful disturbance, cannot be reduced to a pecuniary measure. When its purpose is its utter destruction, the duty to protect becomes correspondingly more urgent and imperative; the ground of this exercise is usually prevention of irreparable injury; or such as cannot be adequately estimated in damages in law; at other times, the avoidance of a multiplicity of suits; and again, the abatement of annoyances in the nature of a legal nuisance."

"Another controlling reason for interference by Equity in such cases is that the public at large have an interest in the exercise of such a privilege as well as the parties paricularly interested." *Broadway States Co. vs. American Society, etc.*, 15 Abb. Pr. N. S., 51

Again, at page 351, the Court says:

"The suggestion that the Court, under the peculiar circumstances of this case, must abdicate their jurisdiction because of the fact that it is dealing with an ordinance of a municipal corporation of a quasi-criminal character, the violation of which is made an offense, does not strike us favorably. The power to prevent irreparable injury, flowing from the deficiencies and inelasticity of the more technical rules of the common law, may be the very life of equitable jurisdiction. The Court must, therefore, be jealous of its preservation, notwithstanding it may also be cautious in its exercise. Municipal corporations can claim no exemption from being subjected to it. They must stand in our Courts upon terms of equality with all other corporations and with natural persons."

It cannot be tolerated that a municipal corporation in view of these principles, should escape the grasp of a Court of Chancery in a clear case of equitable cognizance, by the device of adding the penalty to an illegal and void ordinance which is designed as a repudiation of its own valid grants or contracts established in a case where the puble are concerned, and a Court of Law can afford no remedy adequate for the prevention of irreparable injury that would probably result from the enforcement of such an ordinance."

This case is, in many respects, on all fours with the instant case, except that the case here is much stronger, because, the defendant is attempting to interfere with the

legitimate discharge of its duties, not upon a street, but upon the right of way of the plaintiff. This, too, is not in contravention of a contract made by the City, but by the State itself. In the case of *Port of Mobile vs. Railroad* just cited, the right to unload in the street was founded upon the fact that the railroad had been granted the right to build spur tracks in the streets for the purpose of carrying on its legitimate business.

In the case of *Ga. R. & B. Co. vs. City of Atlanta*, in which the plaintiff, the railroad company, began to fence an open way near its depot, which was not a part of its right of way, but which had been used by the public for many years, and the city undertook by an ordinance forbidding the obstruction of streets, to prevent the bulding of the fence, the city was restrained. The Court at page 258 of the 45 S. E. R., says:

"The city insists, however, that the refusal to grant the injunction was proper, since Equity will not interfere with the enforcement of criminal laws, nor aid, nor obstruct criminal courts in the exercise of their jurisdiction.

"But that principle in noway deprives a Court of Equity of its power to protect private property, nor oust chancery of its jurisdiction over nuisances and trespasses, nor prevent the grant of injunction against threatened or existing wrongs, nor defeat its power to enjoin a continued injury to property or business. When Equity acts in such instances it ignores the criminal feature and exercises jurisdiction solely with reference to the effect of the act on property or on business. Were this a contest between two private individuals, both claiming title to the land, the one in possession could have proceeded by a bill, and would have been protected against violent or forcible obstructions by the other claimant only after he had established his title. The parties here are not on equal terms. The company was in possession and was notified by the City Engineer that, if it attempted to build a fence, he would resist by force of arms. The demurrer admits that the city would aid its officer by prosecuting the agents of the company, who might, from day to day, obey lawful orders. If the company is deterred from exercising its power as owner by the threat of prosecution, it is as much deprived of its rights as if the chancellor had expressly restrained it from building the

fence. In practical effect, therefore, the refusal to grant the railroad an injunction against the City is the equivalent of granting the city an injunction against the company."

Again, quoting from the City of Atlanta vs. Gate City Gas Light Company 71 Ga., 106, the Court says:

"Where it is manifest that a prosecution and arrest is threatened for the sole purpose of preventing the exercise of civil rights conferred directly by law, injunction is the proper remedy to prevent injury to the party thus menaced."

Plaintiff in error therefore asserts and contends that it is entitled to injunctive relief in this case, and that there was error in the ruling opinion of the Supreme Court of North Carolina in affirming the Superior Court of Wayne County in its refusal to make the injunction prayed for perpetual in this case.

Respectfully submitted,

F. D. McKENNEY,
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GEO. M. ROSE,
Attorneys for Plaintiff in Error.

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Supreme Court of the United States

OCTOBER TERM, 1913

No. 112

ATLANTIC COAST LINE RAILROAD COMPANY,
PLAINTIFF IN ERROR,
versus
CITY OF GOLDSBORO,
DEFENDANT IN ERROR.

In Error to the Supreme Court of the State of North Carolina

Brief for Defendant in Error

STATEMENT OF ADDITIONAL NECESSARY FACTS.

The plaintiff in error will be designated herein as the "Railroad Company" and the defendant in error as the "City."

The main streets of the City are called East and West Center streets. These streets run north and south and are on either side of the Atlantic Coast Line Railroad. There are numerous cross-streets crossing East and West Center streets and the railroad at right angles. These cross-streets are 60 feet in width except Ash street, which is 90 feet wide. Beginning at the north and coming south the railroad crosses the said streets in the following order, to wit:

Holly street, Beech street, Oak street, Ash street, Mulberry street, Walnut street, Chestnut street, Spruce street, Pine street, and Elm street. The distance between each of said cross-street, Walnut street, Chestnut street, Spruce street, Pine Holly street, on the north, to Elm street, on the south, is about 5,000 feet.

It is not denied by the Railroad Company that East and West Center streets have been used by the City as streets for 50 or 60 years. The trial judge (record, bottom of page 67) found as a fact "that for 50 years or more the defendant has had charge of these streets, regulating, controlling, and treating them as other streets of the City."

The opinion of the Supreme Court of North Carolina (record, bottom of page 74) declares "the City has from time to time laid out numerous streets crossing said road-bed and has worked and maintained these streets and cross-streets for more than 60 years, including all of East and West Center streets, outside of the actual space occupied by plaintiff's road-bed."

This finding of fact by the trial court affirmed by the Supreme Court of North Carolina is based upon undisputed evidence. We direct attention to some of said evidence, as follows, to wit:

Col. J. A. Washington states (record, bottom of page 58) "that the description of the lots conveyed in deeds on East and West Center streets uniformly calls for the line of said streets and never for the right-of-way of the railroad; that the streets in said City known as East and West Center streets have been used to affiant's knowledge as streets of said City for a period of more than 60 years, and have been occupied, kept in order, maintained and improved by said City as a part of its system of streets."

Three other witnesses state under oath (record, top of page 54): "That East and West Center, Elm, Pine, Spruce, Chestnut, Walnut, Mulberry, Ash, Oak, Beech, Vine, and Holly streets are streets in said City; that East and West Center streets run parallel and join the tracks of the railroad; that Elm, Pine, Spruce, Chestnut, Walnut, Mulberry, Ash, Oak, Beech, Vine, and Holly streets cross the tracks of the railroad, and that all of the aforesaid streets have been used as such continuously in the position and description as stated by the City for a period of over 40 years." The City has graded, paved,

and lighted East and West Center streets, has policed the said streets as streets for more than half a century.

By leave of the Supreme Court of North Carolina the following affidavit of the Mayor of the City was filed:

> John R. Higgins, Mayor of the City of Goldsboro, being duly sworn says: that Elm, Pine, Spruce, Chestnut, Walnut, Mulberry, Ash, Oak, Vine and Holly streets are streets in the City of Goldsboro and have been for a great number of years, and that all of said streets cross the tracks of the A. C. L. R. R. which run along East and West Center streets in said city.
>
> That between Spruce street and Ash street there is an intervening distance of four blocks; that between these two streets, and along East and West Center streets, there is a continuous traffic which at many times is congested to a great extent. That Spruce and Ash streets and the other cross-streets intervening between these two streets are the main business cross-streets of the city, and that the business of the general public necessitates the daily and continuous use of these cross-streets which cross the tracks of the A. C. L. R. R., and that along these cross-streets the traffic is so great that at times the streets are congested. That the business houses of the City are so situated that the daily and continuous use of these cross-streets is necessary to the maintenance of their business. That these said cross-streets from Spruce to Ash, inclusive, are the streets which are used almost exclusively by the school children of the city in going and returning from school. That there are in the neighborhood of fourteen hundred school children who attend the graded schools of the city. That the foregoing conditions have existed for many years.
>
> That the warehouses of the railroads whose tracks run along East and West Center streets can now be easily reached without using the tracks along the said streets, from the fact that said railroads now have

tracks running around the outskirts of the city by way of the Union Depot, on and by which they can readily reach their warehouses."

On page 31 of the record an agreed statement of facts made between the City and the Railroad Company in another suit than the present, contains the following:

"4. That after the organization of the said town, the town of Goldsboro, under authority of the General Assembly, laid out streets in said city, and among others, laid out East Center street on the east side of said railroad track, which has since been used as such street without objection on the part of the defendant and its predecessors. That the said East Center street extends from the center of the main track of the defendant, and has always extended from the center of said main track, sixty-five feet eastwardly, and is the same width from Chestnut street south to Ash street north; that the whole of said East Center street, as the same was located and has been and is now in use, is located on the lands described in the deed from Arnold Borden to Wilmington and Raleigh Railroad Company."

Indeed, the Railroad Company, in its complaint (page 11 of the record) alleges:

"13. That since the incorporation of the town of Goldsboro, or at least for a great many years, the right-of-way of the plaintiff company not so occupied by the roadbeds of the plaintiff company, and of the North Carolina Railroad Company, and of the Atlantic and North Carolina Railroad Company, and warehouses of the two last named companies have been known as East Center street and West Center street, and the said portion of the said right-of-way through Goldsboro has been used and keep in repair by the town or city of Goldsboro."

On page 78 of the record it appears that the plaintiff herein, which was the defendant in the suit of Charles Dewey and

others against it, speaks of the whole of West Center street and of East Center street, and of the crossings of East and West Center streets, and declares that they are much less useful than they should be. It adds:

> *"The operation of the trains along said Center street increases annually and the danger accordingly; that trains are constantly passing, and the crossings, notwithstanding the utmost diligence and care on the part of the railroads, are frequently and necessarily blocked; that said Center street is the main business street in the city; it is frequently crowded with pedestrains and vehicles, and the operation of so many trains daily throughout the length of said street is fraught with danger to life and property."*

This is the language, statement, admission, averment, and oath of the plaintiff herein. As early as 1881 (see Private Laws of 1881, chapter 50) the Legislature of North Carolina, in amending the charter of the Town of Goldsboro, and dividing said town into wards, called for East and West Center streets, and recognizes their existence. On page 33 of the record the Railroad Company agreed to the following state of facts:

> "8. That carloads of freight are unloaded from the cars of the defendant on East Center street north of Walnut street, and that drays and wagons taking freight from said cars approach the same and take the freight on said East Center street, * * * and that the depot and baggage-room of the defendant (plaintiff herein) are also situated on said streets, but are not on the right-of-way of the defendant (the railroad company).
>
> "9. That the defendant (the railroad company) has no land on East or West Center street between Chestnut and Ash streets except the land conveyed to the Wilmington and Raleigh Railroad Company by Arnold Bordon, the east side of which is known as East Center street and the west side of which is known as West Center street."

It thus appears that the public have been using both East and West Center streets and the cross streets of said City for all purposes for which a street is available. It further appears that the City of Goldsboro has paved a large part of East and West Center streets and the streets crossing said Center street; that this paving has been done by the City with the full knowledge of the plaintiff. and the City has paid for the same. It also appears that compliance with the ordinance requiring the change of grade can be effected by the plaintiff at a cost of from $3,000 to $4,300. (See affidavit of D. W. Cross, page 49 of record, and R. A. Colvin, page 55 of record.) It appears from the affidavit of R. A. Colvin, City engineer (pages 55 and 56 of record), that "the crossings over the said tracks of Mulberry, Oak, Pine, and Beech streets are very bad on account of the elevation of the said tracks above the established grade, particularly on account of the inconvenience and dangers suffered by vehicles in crossing the same." He further swears that the lowering of the said tracks would work no hardship on the plaintiff by reason of the changing of grade, nor render the operation of its trains more difficult, inconvenient, or expensive; that "while the tracks of said railroad companies remain in their present condition and do not conform to the grade established by the defendant the flow of surface water is obstructed and ponded on the streets of the City, and stands for a considerable length of time in the cut to the south of Chestnut street, where the same becomes stagnant and injurious to the health of the citizens of said city."

The City contends that it has the right under its charter and the general law of North Carolina governing cities and towns to properly police, control, and regulate its treets, including the two most important thoroughfares in the City, East and West Center streets. To this end the City promulgated the ordinances which are attacked in this case.

SCOPE OF THE DECISION OF THE SUPREME COURT OF NORTH CAROLINA.

The ordinances whose validity is assailed are as follows:

"Section 2. That the shifting limits on East and West Center streets shall be on the south from Spruce street to the city limits, and north from Ash street to the city limits.

"Section 3. That it shall be unlawful for any railroad or railway company to do any shifting on East and West Center streets, between Spruce and Ash streets, at any other time than from the hours of 6:30 to 8:30 a. m. and from 4:30 to 6:30 p. m. Any railroad or railway company violating this ordinance shall be subject to a fine of $50 for each offense.

"Seceion 4. That it shall be unlawful for any railroad or railway company to place any car and allow said car to stand for a longer period of time than five minutes at any point on East and West Center streets, between Spruce and Ash streets. Any railroad or railway company violating this ordinance shall be subject to a fine of $50 for each offense.

"Section 5. That all railroad and railway companies owning tracks on East and West Center streets between Walnut and Vine streets in said city of Goldsboro are hereby required to lower said tracks, so as to make the same conform to the grade line of said streets, and said tracks to be filled in between the rails; the grade line of said street being as follows: Beginning at the present grade line, corner of Walnut and East and West Center streets, to be lowered six inches to corner of Mulberry and East and West Center streets, ten inches to corner of Ash and East and West Center streets, eighteen inches to corner of Oak and East and West Center streets, and eighteen inches to corner of Vine and East and West Center streets.

"Section 6. That any railroad or railway company failing or refusing to comply with the above ordinance shall be guilty of a misdemeanor and fined $50, and

each and every day that said tracks are allowed to remain shall constitute a separate offense.

"That these ordinances go into effect on November 20, 1909, with the exception of Section 5, which shall go into effect ninety days from this date, November 1, 1909."

These ordinances were construed by the Supreme Court of North Carolina and this construction will be adopted by the Supreme Court of the United States.

> "The construction given to the statute of the State by the highest judicial tribunal of the State is regarded as a part of the statute and is as binding as is the text upon the courts of the United States."
>
> Mitchell v. Lippincott, 94 U. S., 767.

> "This construction is a rule of property of the State, and we are as much bound by it as if it were a part of the statute."
>
> Digest of U. S. Reports, Lawyers' Coöp. Ed., Vol. 2, p. 2346.

That the highest court of the State of North Carolina was divided in its opinion in no way affects the force of this rule.

> Williams v. Eggleston, 170 U. S., 304.

The Railroad Company in its brief (page 4) states that it takes exception "not so much to the law laid down in the opinion of the Chief Justice as to its application to the facts in this case." It will be observed that one of the main attacks made by the said company upon the ordinances of the City is that the said company will be unable to shift and transfer cars from its freight yard to the south of the city and to the freight yards of other railroad companies to the north of the city (page 18 of its brief). The Supreme Court, construing these ordinances (record, page 78), states that the word "shifting" has no such meaning in the said ordinance. *"The ordinance does not apply*

to the transfer of a car or cars from one railroad to another in the City." The court further says that it understands the ordinances in forbidding the "shifting" within the limited space of four blocks on the main street in the center of the town, to refer to what is commonly understood by that expression, to wit: "Cutting out and putting in cars and the making up of the train before it is dispatched on its journey." "Such a regulation certainly can not be held void and is a reasonable exercise of the police powers for the convenience and safety of the public at the four crossings designated."

Further along in the opinion attention is called to the fact that the Railroad Company has built a line of railroad from the south of the city to the union passenger station, and thence connecting with its main line to the north of the city. The length of this new piece of railroad is something over a mile and the new track so built enables the Railroad Company to run its cars expeditiously without hindrance and without danger to the thickly-congested portions of the City along East and West Center streets.

The Supreme Court further holds that the ordinance requiring the shifting or making up of cars between Spruce and Ash streets, except between the hours of 6:30 to 8:30 a. m. and 4:30 to 6:30 p. m., or to allow any car to stand for a longer period than five minutes at any point on East and West Center streets, between Spruce and Ash, is valid. "East and West Center streets constitute the main street of the town, and that portion of it between Spruce and Ash, four blocks, is the very heart of the City." The opinion further calls attention to a former suit of *Dewey v. Railroad*, 142 N. C., 392, in which the railroad company filed an answer under oath stating "that the operation of trains along said Center street increases annually and the danger accordingly; trains are constantly passing and the crossings, notwithstanding the utmost diligence on the part of the railroad, are necessarily blocked; said Center street is the main business street in the City, it is frequently crowded with pedestrians and vehicles and the operation of so many trains

daily throughout the length of said street is fraught with danger to life and property."

It will thus be seen that the scope of the decision of the Supreme Court is that the ordinances in question are valid in manner and form as construed in the said opinion, to wit:

The second ordinance fixing shifting limits and the third ordinance regulating the hours between which the Railroad Co. can do shifting on East and West Center streets between Spruce and Ash streets, in the very heart of the City, are reasonable, and this for the reason that the Railroad Company admits that it is dangerous so to do. The Court defines the word "shifting" so as to give the Railroad Company the most ample facility in the transfer of car or cars and in the operation of its cars and trains upon said track. The ordinances fix the hours from 6:30 to 8:30 a. m. and from 4:30 to 6:30 p. m. because during these hours the said thoroughfare is less congested and the numerous school children and others who are required to cross the railroad track and East and West Center streets would be subjected to less danger to life and limb. The Court likewise holds that the fourth ordinance is valid, which ordinance forbids the storage of cars for a greater period than five minutes in the contracted space of a few hundred feet between Spruce and Ash streets on East and West Center streets.

It will be noted that the Railroad Company has the entire space south of Spruce street in which to shift, which space is more than one-third of a mile, and, as the opinion of the Court points out (record, page 78), "The Railroad Company has its shifting yards further out where its trains can be made up and where at least a chief part of the necessary shifting can be done."

The Supreme Court finally holds that ordinance No. 5, requiring the Railroad Company to lower its tracks to make the same conform to the grade of said streets and to fill in said tracks between the rails, is a reasonable exercise of the police power of the City. In this connection it will be noted that the

Railroad Company, in its brief, page 4, makes no question as to the City's right to require the Railroad Company to lower the grade *at* the cross-streets, but does contest the right of the City to require the Railroad to lower said grade *between* the cross-streets. The cost of so doing is only three or four thousand dollars and as a matter of fact the railroad, doubtless realizing that the streets and the road-bed would be so dangerous and unsightly, if the grading was not done *between* the cross-streets as well as *at* the cross-streets, has conformed to this ordinance throughout and graded at both places

BRIEF OF ARGUMENT.

WHAT RIGHTS HAS THE CITY IN EAST AND WEST CENTER STREETS?

The Railroad Company misconceives the position of the City upon this point. The City is not contending that it is the owner of the soil of East and West Center streets or of the cross-streets where they cross the right-of-way of the Railroad Company, but it does contend that the record shows that the said City has an easement covering said right-of-way on East and West Center streets and the cross-streets. The Railroad Company relies upon section 388 of The Revisal of North Carolina of 1905, which reads as follows:

> "No railroad shall be barred by or presumed to have conveyed any real estate, right-of-way, easement, leasehold or other interest in the soil which may have been condemned or otherwise retained for its use as right-of-way, depot, station house or place of landing by any statute of limitations or by occupation of the same by any person whatsoever."

This statute has been often construed by the Supreme Court of North Carolina. Many of the cases may be found collected in Pell's Annotated Revisal of 1905, under section 388. "This section does not apply to any right-of-way not actually condemned or purchased or taken possession of."

Railroad v. Sturgeon, 120 N. C., 225.
Beattie v. Railroad, 108 N. C., 432.
Blue v. Railroad, 117 N. C., 644.

The Railroad Company long before the enactment of section 388 of The Revisal (which section has grown out of Laws of 1856), dedicated its right-of-way to the use of the public as a street. It is expressly admitted by the Railroad Company in the agreed statement of facts set out above that the City under the authority of the General Assembly of North Carolina, laid

out streets in said City and, among others, laid out East Center street and West Center street. This was done eight or ten years before the passage of the act of 1856. It is to be noted that the act of 1856 was modified by section 388 of The Revisal of 1905.

The North Carolina Supreme Court (record, page 77) construes section 388 of The Revisal and asserts that the Railroad Company herein has a "misconception" of said section. It says "the City is not contending for the ownership of the soil of East and West Center streets. It is merely asserting its right to require the Railroad Company to change the grade of its road-bed where it is crossed by other streets, so that public travel and the drainage of the City may not be impeded."

The purpose and intent of the statute above quoted is plainly to protect railroads against the loss of their right-of-way by physical occupancy thereof by some person or corporation claiming to hold adversely. It was never designed to prevent the public from gaining an easement to travel over its right-of-way. These two easements, the easement of the railroad and the easement of the public to travel over its right-of-way, are not inconsistent and can both be enjoyed without disturbing each other.

But if this were not true, and the statute should be given a liberal construction in favor of the railroad corporation, and held to exclude the obtaining of an easement by the public to travel over the right-of-way, still the plaintiff has long since been equitably estopped to deny the right of the City of Goldsboro to the use of East and West Center streets, and the streets crossing the same. For sixty years property has been bought and sold calling for said streets. For sixty years the town and City of Goldsboro have worked and maintained the entire right-of-way not actually occupied by the tracks of the plaintiff and its warehouse, at one time macadamizing a considerable part of said right-of-way of plaintiff at a cost of more than $2,000. For sixty years the people have been building up the City of Goldsboro on both sides of plaintiff's right-of-way, and have been

using East and West Center streets and the crossings thereo until a population of 10,000 has grown up in and about sai City. In the language of the plaintiff itself "said Center stree is the main business street in the City, is frequently crowde with pedestrians and vehicles." The plaintiff for sixty year has seen the exchange of property, growth and development o the City on the assumption that said street belonged to the Cit and will always be open to the public and kept and maintaine in good repair by the city. Indeed, the plaintiff, being a prop erty-owner in said City, has itself paid taxes time and tim again to the city for the purpose of keeping up these very streets Under these circumstances is it not manifest that the plaintif is equitably estopped to deny that these are streets of the Cit and that the public have a right to use them as freely as if the had been condemned? "The principle of equitable estoppel," says the Supreme Court of the United States, "is an importan one in the administration of the law. It not unfrequently give triumph to right and justice where nothing else would save the from defeat. It proceeds on the ground that he who has bee silent as to his alleged rights when he ought in good faith to hav spoken, shall not be heard to speak when he ought to be silent."

Bank of U. S. v. Lee, 13 Peters, 107, cited in Morgan v Railroad, 96 U. S., 716.
Madison v. Williams, 66 N. C., 564.

Not only is the Railroad estopped from denying the right o the City to these streets, but by its conduct it has dedicated the to the use of the public. The public have bought and paid hig prices for lots fronting on East and West Center street, knowin that said streets had been laid out by the City under legislativ authority. (See page 31 of the record, where the plaintiff ad mits that the town of Goldsboro, under the authority of the Ge eral Assembly, laid out the streets in said City.) The publi have seen the City of Goldsboro repairing, maintaining, an using said streets. The citizens of said City have paid taxes t have a portion thereof macadamized, and all this has been don

with the full knowledge of the plaintiff, and never until now has it sought to repudiate the right of the public to the use of these streets. These facts and circumstances, it seems to us, are conclusive evidence of the dedication of these streets by the plaintiff to the use of the public.

Morgan v. Railroad, 96 U. S., page 723.

"An implied dedication is one arising by operation of law from the acts of the owner. It may exist without any express grant *and need not be evidenced by any writing,* nor, by any form of words, oral or written."

Elliott on Roads and Streets (2 Ed.), secs. 121, 122, 123, etc.

"The public, as well as individuals, have a right to rely on the conduct of the owner as indicative of his intent. If the acts are such as would fairly and reasonably to an ordinary prudent man infer an intent to dedicate, and they are so received and acted upon by the public, the owner cannot, after acceptance by the public, recall the appropriation. Regard is to be had to the character and effect of the open and known acts, and not to any latent or hidden purpose."

Idem, section 124.

Tise v. Whitaker, 146 N. C., 374.

It is too late for the railroad company to undertake to deny the right of the city and the public generally to the use of East and West Center streets, as well as the streets which cross these two at right angles. They have all been laid out under legislative authority, have been worked, repaired, and maintained by the city at public expense for sixty years, and hundreds of thousands of dollars have been invested in real estate lying on these streets upon the faith that the streets belong to the public and would forever be kept open. They belong to the city as much as if they had been condemned and paid for or bought outright and a deed made therefor. This, however, does not involve the

necessity of holding that the plaintiff could not, if it saw fit, and there was a necessity to do so, put any other tracks along East and West Center streets. The use by a railroad and by the city is a public use, and neither is inconsistent with the other. Neither the railroad nor the city has the right to exclude the other from the use of East and West Center streets.

THAT THE RAILROAD WAS CONSTRUCTED BEFORE THE CITY WAS BUILT DOES NOT AFFECT THE PRINCIPLE, HEREIN, OF THE POLICE POWER.

But the Railroad insists that even if the streets belong to the City, that they were laid out and established long after the Railroad had secured its right of way, and that the crossings over said right of way must be maintained by the City at its own expense, and that the Railroad can not be required to maintain its crossings, much less to change its grade at the crossings so as to make them safe. The Railroad has overlooked its own charter. Section 27 of plaintiff's charter, Laws of 1833, provides:

> "That it shall be lawful for the said company in the construction of said road to intersect or cross any public or private way established by law; and it shall be lawful for them to run their road along the route of any said road: *Provided,* that whenever they intersect or cross said public or private road the president and directors shall cause the railroad to be so constructed as not to impede the passage of travelers on public road or private way aforesaid."

This provision of the charter is as applicable to new roads and streets as it is to old roads and streets. The Railroad took this charter, knowing that the State had the right to lay out new roads. It took the charter knowing that towns and cities would grow up along the line of its road, and that new streets would be opened across its right of way; and taking its charter with this knowledge, the State had a perfect right at any subsequent time to lay out new roads and new streets and require

the railroad to be so constructed as not to impede the passage of travelers on the public road.

State ex rel. Minneapolis v. St. Paul, M. & M. R. Co., 98 Minn., 380; 28 L. R. A. (N. S.), 307.

In that case the charter of the Minnesota and Pacific Railroad Company, under whom the defendant claimed, provided:

> "The said company shall have the right and authority to construct their railroad and branches upon and along, across, under, or over any public or private highway, road, street, plank road, or railroad, if the same shall be necessary; but the said company shall put such highway, road, street, plank road, or railroad in such condition and state of repair as not to impair or interfere with its free and proper use."

The Supreme Court of Minnesota held that this provision of the charter was as applicable to new public roads laid out across the right of way as it was to old public roads over which the right of way ran. It says:

> "While the statute on its face might be construed as intended to apply to existing highways only, a fair and reasonable construction thereof, in view of the legislative policy of the State on this subject, and the propriety and necessity for some specific regulation, will bring within its scope and purpose streets and highways subsequently laid out and opened. It is elementary that charters of public corporations, in which the rights of the public are involved, are to be construed with strictness against the corporations, and liberally in favor of the public. * * * The operation of statutes is often extended, by construction, to matters of subsequent creation, and applies to conditions that accrue after their passage, as well as to those that existed before. * * * The language of statutes, when under liberal construction, is flexible, and general words admit of more than one interpretation. The Court may carry the statute beyond the natural import of its words when essential to answer

the purpose of the Legislature. * * * It is 'an old and unshaken rule in the construction of statutes, to-wit, that the intention of a remedial statute will always prevail over the literal sense of its terms, and therefore, when the expression is special or particular, but the reason is general, the expression should be deemed general.' * * * The purpose of incorporating this particular provision in the charter of the railroad company was in the interests of the public and to require the railroad company to keep in good repair all crossings at the intersections of highways. The evils intended to be guarded against are the same, and apply equally to both new and old streets. There was no reason why the Legislature should deem it prudent to provide for existing highways only; and we do no violence to the rules of statutory construction in holding that the provisions of defendant's charter were intended to include all streets and highways intersected by railroads, whether laid out before or after the building of the railroad. The expression of the statute is special, perhaps; but the reason therefor is general. The expression must therefore be deemed general. A railroad company accepts and receives its franchise subject to the implied right of the State to lay out and open new streets and highways over its tracks, and must be deemed, as a matter of law, to have had in contemplation at the time its charter was granted, and is bound to assume, all burdens incident to new, as well as existing crossings."

The same doctrine is held in the States of Maine, Connecticut, Illinois, New York, Tennessee, Indiana, Texas, Mississippi, Ohio, Nebraska, New Jersey, Vermont, Wisconsin, and by the Supreme Court of the United States. The latter Court affirmed by a *per curiam* judgment the judgment of the Supreme Court of Minnesota in the case from which we have quoted.

214 U. S., 497.

One of the best considered cases on this subject is the case of *Cleveland v. City Council of Augusta*, 102 Ga., 233, 43 L. R. A.,

638. In that case the railroad was completed before the point in controversy was taken into the city of Augusta, but the railroad did run across a public road, not then a street. When the territory was taken into the city of Augusta, the city raised its grade in order to protect portions of the city from the overflow of the Savannah River. Having raised the grade and coming to the railroad, the city passed an ordinance requiring the railroad to raise its roadbed. This the railroad resisted, but agreed that if the city would pay the expense thereof, it would raise its roadbed and submit to the court the question of liability. The city paid the expense, the railroad doing the work, and the matter was taken to the court. The Supreme Court of Georgia held that the railroad company was liable for the expense of raising its roadbed to conform to the city grade, and said that it must yield to the reasonable burdens imposed by the growth and development of the country or the city, and where the public welfare demands a change of the grade of the highway or street, the railroad company must, at its own expense, make such alteration in the grade of its crossing as will conform to the new grade. In the course of the opinion, the Court says:

> "Upon streets or highways crossed by it, or subsequently laid out, the railroad company must construct proper crossings (State, Lancaster County v. Chicago, B. and O. R. R. Co., 29 Neb., 412; L. N. A. and C. R. Co. v. Smith, 91 Ind., 119, 13 Am. and Eng. R. Cases, 608), and must alter, change, or otherwise reconstruct such crossings whenever the public welfare demands. (English v. New Haven and N. Co., 32 Conn., 240.)"

The doctrine is most clearly stated in the following quotation:

> "When the railroad company laid its track across the highway, it did so subject to the right of the public authorities to make such alterations or changes in the highway, either by lowering or raising the grade, widening or otherwise improving the same, as the public safety and welfare might require. In doing so, the presence of the railroad necessitates a certain charac-

ter of crossings and safeguards which otherwise would not exist; and with however much plausibility it might be argued that the public authorities should be required to do just such work as they would have to do did the railroad not exist, it is certain that the railroad company should bear the burden of such work as is made necessary by reason of the peculiar and dangerous character of its operation. The principle of the common-law rule is embodied in this statute. *It is the railroad which makes the construction of a railroad crossing necessary, whether the highway be laid out before or after the construction of the railroad.*" [Italics ours.]

The same doctrine is clearly and unequivocally enunciated by the Supreme Court of the United States in *Northern P. R. Co. v. Minnesota ex rel. Duluth*, 208 U. S., 583. This case came to this Court by writ of error from the Supreme Court of Minnesota. The city of Duluth had passed an ordinance requiring N. P. R. Co. to make repairs to a viaduct, at its own expense, for the passage of a street under the railway. The Supreme Court says:

"As the Supreme Court of Minnesota points out in the opinion in 98 Minn., 380, the State courts are not altogether agreed as to the right to compel railroads, without compensation, to construct and maintain suitable crossings at streets extended over its right-of-way after the construction of the railroad. *The great weight of State authority is in favor of such right.* [Italics ours.] See cases cited in 98 Minnesota, 830. There can be no question as to the attitude of this Court upon this question, as it has been uniformly held that the right to exercise the police power is a continuing one; that it cannot be contracted away, and that a requirement that a company or individual comply with reasonable police regulations, without compensation, is the legitimate exercise of the power and not in violation of the constitutional inhibition against the impairment of the obligation of contracts."

After citing a great number of authorities in support of this doctrine, the Supreme Court adds:

> "The result of these cases is to establish the doctrine of this Court to be that the exercise of the police power in the interest of public health and safety is to be maintained unhampered by contracts and private interests, and that uncompensated obedience to laws passed in its exercise is not violative of property rights protected by the Federal Constitution."

The Court further adds:

> "The exercise of police power cannot be limited by contract for reasons of public policy, nor can it be destroyed by compromise, and it is immaterial upon what consideration the contracts rest, as it is beyond the authority of the State or the municipality to abrogate this power, so necessary to the public safety."

We think in view of these authorities, and the reasoning upon which they are based, that the contention of the plaintiff that because its road was located before the laying out of the streets in controversy, it can not be required to comply with a reasonable police regulation requiring it to lower its track to conform to the general grade of the city, can not be maintained. On the contrary, it is clear, both on reason and authority, that the railroad can be required by the State to lower its tracks or to raise them, and this without compensation, because the requirement is in the exercise of the police power and is not the taking of private property for public uses.

It is not necessary that the police power be granted in express words, for by the organization of a city or borough within its borders, the State imparts to its creature, the municipality, the powers necessary to the performance of its functions and the protection of its citizens in their person and property, and the police power is one of these functions. The legislative authority of the State under the police power also extends to all matters

necessary to the safe crossing of a railroad track over a highway or another railroad.

A. and E. (2 Ed.), vol. 22, pages 720 and 732, respectively.

Commissioners of municipal corporations can make the railroads change both grade and track.

Elliott on Roads, sec. 461; also 76—463.

The duty under police power to regulate comprehends all powers necessary and convenient to protect life or limb or to promote the comfort of the public in the use of its streets.

The police power of the State is jealously guarded by our courts—both State and Federal. "IT IS THE MOST ESSENTIAL OF FORCES, AT TIMES THE MOST INSISTENT AND ALWAYS ONE OF THE LEAST LIMITABLE OF THE POWERS OF GOVERNMENT."

Eubanks v. Richmond, 226 U. S., 137.
Dist. v. Brooke, 214 U. S., 138.

IN CHICAGO AND N. W. R. R. Co. v. CHICAGO, 140 ILL., 309, THE POLICE POWER IS DECLARED TO BE "A POWER COEXTENSIVE WITH SELF-PROTECTION, AND IS NOT INAPTLY TERMED THE LAW OF OVERRULING NECESSITY."

IN CHICAGO M. AND ST. P. R. Co. v. MILWAUKEE, 97 WISCONSIN, 418, THE COURT SAYS:

> "THESE CONSIDERATIONS ARE ABUNDANTLY SUFFICIENT, JUDICIALLY CONSIDERED, TO LEGITIMATELY LOCATE THE WHOLE SUBJECT OF MAINTAINING SAFE CROSSINGS WITHIN THE DOMAIN OF POLICE REGULATIONS, SO FAR AS THE LEGISLATIVE BRANCH OF GOVERNMENT MAY SEE FIT TO EXERCISE ITS AUTHORITY. IT NEEDS NO EXTENSION OF WELL-SETTLED PRINCIPLES TO REACH THIS CONCLUSION. BUT IF IT DID, THE INCREASE OF RAILROAD OPERATIONS, THE GROWTH OF POPULATION, AND SOCIAL AND BUSINESS ACTIVITIES, WITH CONSEQUENT INCREASING DANGERS TO PERSONS AND PROPERTY, MIGHT REASONABLY WARRANT THE EXTENSION. THE TENDENCY OF MODERN DEVELOPMENT

IS IN THE DIRECTION OF GREATER RATHER THAN MORE RESTRICTED USE OF POLICE POWER, AND NECESSARILY SO IN ORDER TO MEET THE NEW DANGERS AND INCREASE OF THE OLD DANGERS, CONSTANTLY OCCURRING AS NATURAL INCIDENTS OF ADVANCING CIVILIZATION. WE THINK THE WEIGHT OF MODERN AUTHORITY IS IN ACCORD WITH THE VIEWS JUST EXPRESSED, AND TO THE EFFECT THAT EVERYTHING THAT GOES TO MAKE A CROSSING SAFE FOR PUBLIC USE IS AS ESSENTIALLY WITHIN POLICE REGULATIONS AS ANY PART OF IT."

THE CITY HAS AMPLE AUTHORITY UNDER ITS CHARTER AND THE GENERAL STATUTES TO PROMULGATE THE ORDINANCES.

The charter of the city of Goldsboro provides, section 27: That among the powers herein conferred on the board of aldermen, they shall provide water, provide for repairing and *draining* the streets, and regulate, suppress, and remove nuisances.

Section 37 provides that the board of aldermen shall have power to lay and open new streets within the corporate limits of the city whenever by them deemed necessary, and have power at any time to widen, enlarge, change, or extend or discontinue any street or streets, or any part thereof.

Section 46 provides that the board of aldermen shall cause to be kept clean and in good repair the streets, sidewalks, and alleys. They may establish the width and ascertain the location of those already provided, and lay out and open up others, and may reduce or increase the width of all of them.

Section 48 provides that the aldermen may require and compel the abatement of all nuisances in the city at the expense of the person causing the same, or the owner or tenant on the grounds whereon the same may be.

Section 60 provides that the city of Goldsboro is hereby vested with all powers, rights, privileges, and immunities enumerated in chapter sixty-two of The Code, not inconsistent with any provisions of this act.

Section 61: "That the city of Goldsboro may pave its streets and sidewalks."

Section 74: "The city of Goldsboro shall have power in its discretion to assess owners of land abutting on streets paved by said city with an amount not to exceed one-third of the actual cost of such paving in front of such abutting land."

Section 78: "That the Board of Aldermen of the City of Goldsboro shall have power to issue bonds in the sum of one hundred and fifty thousand dollars, the proceeds of which shall be applied to and used for the sole, only, and exclusive purpose of paving and macadamizing the streets and sidewalks of said city."

Chapter 62 of The Code, 73 of The Revisal, sec. 2929, provides:

> "The board of commissioners may pass laws for abating or preventing nuisances of any kind, and for preserving the health of the city."

Section 2930 of The Revisal:

> "The board of commissioners shall provide for keeping in proper repair the streets and bridges of the town in the manner and to the extent they may deem best; may cause such improvements in the town to be made as may be necessary."

The Legislature of North Carolina, in amending the charter of the City of Goldsboro and providing for the division of the city into wards, has repeatedly recognized the existence of East Center and West Center streets. For instance, section 3 of the charter as it now stands provides:

> "First Ward, beginning at a point in the center of East Center and West Center streets where the center of Chestnut street intersects the same, and runs thence northwardly with the center of said East Center and West Center streets to a northern boundary line of said city."

On page 31 of the record it appears that the plaintiff, in the suit between it and the city of Goldsboro, with reference to the paving of East Center street, agreed to the following facts:

> "That after the organization of said town and while the Wilmington and Raleigh Railroad was using and

operating its railway over the land hereinbefore referred to, the town of Goldsboro, under authority of the General Assembly, laid out streets in said city, and among others it laid out East Center street on the east side of said railroad track, which has since been used as such street without objection on the part of the defendant and its predecessors. The said East Center street extends from the main track of the defendant and has always extended from *the center of said main track 65 feet easterly*, and the same width from Chestnut street south to Ash street north."

It appears from the record, pages 32 and 33 that the city of Goldsboro actually paved the right of way of the plaintiff herein on East Center street between Chestnut street south and Ash street north, and paid therefor the sum of $2,070.09, and when the city sought to make the plaintiff herein pay one-third of the cost thereof, as other property holders of the city of Goldsboro were compelled to do, the railroad successfully resisted payment thereof. It is to be noted, also, that the ordinance complained of, being section 5 of the ordinances set out, only requires *the plaintiff to lower its* TRACK so as to make the same conform to the grade line of said street. It does not require the railroad to lower the *grade line of the* STREET. This the city expects to do and pay for. It also expects to pay for all the paving without costing the railroad one cent. In this connection it is not to be overlooked, that on page 33 of the record the plaintiff herein admits that by reason of the paving of said street the A. C. L. has been benefited. It should be observed, also, that the city of Goldsboro has acted with considerate caution in adopting section 5 of the ordinances. The ordinance does not go into effect for ninety days. It does not require of the railroad any change of its grade south of Walnut street. (See pages 6 and 7 of the record.) To require a change south of that street would require a much larger expenditure of money on the part of the railroad. For instance, at Elm street the present grade of the railroad is six feet three inches below the

established grade of the street, and no change is required by this ordinance in reference to the grade at this point.

It is not in the record, but it is a fact of which possibly the Court might take judicial notice, that the railroad bridge across Neuse River, three miles south of Goldsboro, is several feet higher than the track lying between said bridge and the city of Goldsboro, and that during the great freshet of 1907 the track of the railroad north of the river and between it and Goldsboro for more than two miles was covered with water, while the railroad bridge over the river proper was four or five feet above the high-water mark. If the railroad saw fit to raise its track from the river bridge to Goldsboro, which would protect it from floods in Neuse River, the tracks would cross Goldsboro on a dead level, or practically so.

These powers above enumerated are very large. *"The power to pave includes the power to grade."* The city has undertaken to grade the streets and sidewalks with a view not only to securing uniformity and comfort, but the proper *drainage* of the town (section 27 of charter). Surface drainage is as essential as under drainage, and this can not be had without a proper grade. The city has established the grade. This grade is eighteen inches lower on one of the cross streets than the railroad track. It is suggested in plaintiff's brief that the city can cross this track by a very gradual rise, and so it can. But it can not make its water do likewise, for water in an open drain can not be made to run uphill. The record shows that this very trouble now exists. On page 57, the city engineer, Mr. R. A. Colvin, swears "that while the tracks of the said railroad companies remain in their present condition and do not conform to the grade established by the defendant, the flow of surface water is obstructed and ponded on the streets of the city and stands for a considerable length of time in the cut to the south of Chestnut street, where the same becomes stagnant and injurious to the health of the citizens of said city." How can the city *drain* the streets and *preserve* the health of its citizens?

Now, it is one of the chief duties of the city of Goldsboro to

preserve the health of the city. They have undertaken to do this by a proper grade of the streets and sidewalks, thereby securing proper drainage. The right of way of the plaintiff intervenes, and this right of way can not be touched by the city. It would be dangerous for the city to undertake to lower or raise the track. This work must be done by experts. For the city to do it would be to imperil the lives of everybody who passed over the tracks. In *Lakeview v. Rose Hill Cemetery Co.*, 70 Ill., 91, 22 Am. Rep., 71, it is said:

> "It is proper that the portion of the street or highway which is within the limits of the railroad right-of-way should be constructed by the railroad company and maintained by it, because of the dangers attending the operation of its road. It should control the making and repairing of its crossings for the protection of those passing along the streets, and of those riding on the cars. * * * The items of expense for which appellant claims compensation are such only as are involved in a compliance with the police regulation. It is well settled that neither a natural person nor a corporation can claim damages on account of being compelled to render obedience to a police regulation designed to secure a common welfare."

There are literally hundreds of cases to the same effect. Their mere enumeration would make this brief too prolix.

One-third of the people of Goldsboro live on one side of the railroad and two-thirds on the other. The track in its present condition is dangerous to the traveling public, whether on foot or in vehicles. At one of the crossings the track is eighteen inches above the grade of the street. This retards travel and makes travel more dangerous. On pages 56 and 57 of the record the city engineer expressly swears that "crossings over said track at Mulberry, Ash, Vine, and Beech streets are very bad on account of the elevation of said tracks above the established grade, particularly on account of the *inconvenience and dangers suffered* by vehicles in crossing same. That it is impossible for

the city in any way to remedy this condition while the said tracks remain upon said streets at their present elevation."

The city has enforced its change of grade against its own citizens. It has dug down the streets and sidewalks and left business houses standing many feet above the level of the street, and then it has compelled the owners of these business houses to pay one-third of the expense of paving the street, which may be ten feet below the entrance to his door. This it has done under its police power. No private owner of property has been in any way compensated. No outcry has been made; but only when a railroad, whose property in North Carolina is worth $28,434,-900, is asked to expend three thousand dollars for lowering its track, when the city itself proposes to lower all the balance of the street which the railroad claims as its right of way, and then to pave said street at the city's expense, do we hear invoked the protection of the Constitution of the United States. But surely the Supreme Court of the United States is the last and highest interpreter of that Constitution, and that Court says:

> "The governmental power of self-protection cannot be contracted away, nor the exercise of rights granted, nor the use of property be withdrawn from the implied liability of governmental regulations peculiar and essential to the preservation of the community from injury."
>
> N. Y. and N. E. R. Co. v. Bristol, 151 U. S., 556.
>
> N. P. R. Co. v. Duluth, *supra*.

A State's police power should be diligently guarded against any needless intrusion. It is almost as great as the power of Congress.

> R. R. v. Husen, 95 U. S., 465.

The requirement that the railroad shall lower its track is not arbitrary nor oppressive. The good faith of the city is shown in its own conduct. It is spending $150,000 of its own money in the paving of its streets, and it is making all of its streets

conform to the fixed grade. It is lowering thousands of yards of streets from fifty to sixty feet wide. It is raising other streets. It is only asking the plaintiff to lower four or five blocks, ten feet wide, at a cost of three thousand dollars, or one-fiftieth of what the city is itself spending. The city proposes to pave the entire right of way of the plaintiff. This makes the right of way safer for the plaintiff's business. It lessens the risk of the public being injured, and lessens the danger of losses to the plaintiff for having to pay for such injuries. We repeat that the action of the city is neither arbitrary nor oppressive. It is doing all the work which it can do and doing it at its own expense. It is simply asking the railroad to do the small piece of work which it is impossible for the city to do. What might be the power of the court of equity and what its duty if the ordinance were oppressive and required the expenditure of a great sum of money, need not be considered. It will be time for this Court to meet that question when some city or town shows itself moved by the spirit of animosity to corporations.

Washington R. R. v. Fairchild, 224 U. S., 510.

The ordinances complained of look to lessening the danger arising from the constant passing of shifting engines up and down the track and to the abatement of the nuisance of having loaded cars standing in the most public street and being unloaded to the obstruction of travel and to the annoyance of the merchants occupying stores opposite the place of unloading. All the white schools of Goldsboro are on the eastern side of the railroad, while one-third of the white population is on the western side. In the main and business portion of East and West Center streets, at the point where most of these children have to cross the railroad on their way to school, shifting is stopped after 8:30 a. m. and is not started until 4:30 p. m., when it may be resumed until 6:30. . At the other parts of the street shifting can go on night and day. The warehouses are situated outside of the restricted shifting limits. Undoubtedly, the city has authority to regulate passage of shifting engines to and fro

through the heart of the city on the main street of the city. Surely, if a street which is crowded with pedestrians and vehicles is at all within the control of the city, it can pass ordinances tending to lessen the danger thereon. The matter of unloading cars on the most public and crowded street of the city is a matter of no concern to the railroad. It is purely a favor to large shippers. It is a nuisance to every other person. It blocks up the streets and increases the danger in a street which is, by the assertion of the plaintiff, "crowded with vehicles and pedestrians." Standing cars being unloaded onto drays by loud and boisterous negroes, certainly ought to be a subject of regulation by the local community. With the cars removed from the street, the necessity for so much shifting through the street will be obviated. The ordinances in question are well within the authority granted by the Legislature. They are wholesome, they are conservative, they are not burdensome, nor are they expensive. Whenever a municipality has authority to restrict at all upon a given subject, the wisdom or unwisdom of its action is not the subject of judicial review. If the action is not plainly oppressive, the courts can give no relief.

> "The city has exactly the same rights in, and is under the same responsibilities for, a street which it controls by dedication only as in and for one which has been granted or condemned."
>
> Tate v. Greensboro, 114 N. C., 392.

> "And the courts will not interfere with the exercise of a discretion reposed in the municipal authorities of the city as to when and to what extent its streets shall be improved, except in cases of fraud and oppression constituting manifest abuse of such discretion."
>
> *Idem.*
>
> Rosenthal v. Goldsboro, 149 N. C., at page 132.

In the latter case Mr. Justice Hoke says:

> "It may now be considered as established with us, that our courts will always be most reluctant to inter-

fere with these municipal governments in the exercise of discretionary powers, conferred upon them for the public weal, and will never do so unless their actions should be so clearly unreasonable as to amount to oppressive and manifest abuse of their discretion."

To the same effect and supporting the contention of the defendant herein as to the right to order a change of grade, see Smith's Modern Law of Municipal Corporations, section 1318, where he says:

> "The exercise of the power to grade rests in the discretion of a municipality in which it and not the courts is the judge of the expediency and necessity. The municipality may impose upon the railroad company the duty of adapting its track and grade to new highways in order to make the crossings safe and convenient."

See, also, Louisville R. R. Co. v. Smith, 101 Ind., 119. Says Clark, Chief Justice, in *Small v. Edenton*, 146 N. C., at page 528:

> "Such local matters are properly left to the people of a self-governing community, to be decided and determined by them for themselves, and not by a judge or court for them."

The Chief Justice then quotes from *Barnes v. District of Columbia*, 91 U. S., 540, the following:

> "The authorities state, and our own knowledge is to the effect, that the care and superintendence of streets, alleys, and highways, the *regulation of grades* and the opening of new and the closing of old streets are *peculiarly municipal duties*. No other power can so wisely and judiciously control this subject as the authority of the immediate locality where the work is to be done."

The opinion in this case quotes in italics The Revisal, section 2930, to the effect that the town council "shall provide for keep-

ing in proper repair the streets and bridges in the town *in the manner and to the extent they may deem best.*"

We call the attention of the Court particularly to what is said on page 530, where the Court recognizes the right of the city in the control over its streets to "secure *uniformity, convenience,* protection from fire, *proportion* and *sightliness* and other necessary things incident to the growth and development of modern municipalities."

This is exactly what the board of aldermen of the city of Goldsboro have undertaken to do. They have undertaken to secure uniformity of grade, protection to its citizens in crossing the railroad tracks, convenience in doing so, proportion and sightliness which come from the uniformity of the grade. These things are declared in *Small v. Edenton* to be within the competency of a municipal government.

Plaintiff in its brief cites *Muse v. Railroad,* 149 N. C., 443. This case has no application to the facts of the present case. In the opinion in that case Mr. Justice Connor, on page 444, says:

> "The undisputed facts are: * * * It is a part of the right of way and has never been condemned or dedicated."

On page 446 he says:

> "They also had a right to pile lumber or other material on it, either for their own use or the use of their patrons, and the officers and agents are the sole judges of such necessity or convenience, *subject, of course, to the police power of the town.*"

It seems that the town of Laurinburg had not exercised any police power over this street. It had not forbidden the piling of lumber thereon. The plain intimation of the Court is, that even though the right of way had not been dedicated to the use of the public, still, if the town had forbidden the piling of lumber there, a different judgment would have been given. The other cases cited by the plaintiff on this point will be found to be based upon like considerations.

Independent of the ownership of the streets, or their condemnation or dedication, and independent of the fact as to which existed first, the right of way or the street, the ordinances are valid because the railroad is in the city of Goldsboro and is subject to the police regulation thereof. These ordinances in effect declare the forbidden things to be nuisances, and it is within the competency of the city to declare what are and what are not nuisances. There are four kinds of nuisances: First, those which are necessarily and obviously such. Second, those which are nuisances or not according to circumstances, such as a stable in a town. Third, those which originally were not, but afterwards, by change of circumstances, became so, such as mill-ponds, powder works, tallow and glue factories, etc. Fourth, where the erection was not originally a nuisance, and does not become so either by mismanagement or in the foreseeable course of events, but which, being originally lawful, becomes a nuisance by force of the ordinance of the corporate authorities of the town.

Privett v. Whitaker, 73 N. C., 554.

Of course the town can not declare a thing which is harmless a nuisance; but if it is not harmless, and is calculated to injure another, then the town may declare it to be a nuisance, and that which was not theretofore a nuisance becomes such by reason of the ordinances. In the case cited, the town of Goldsboro, at that time having no other authority than the general law, forbade the erection of wooden buildings within certain districts. Plaintiff undertook in violation of the ordinance to put up a wooden building, and was forcibly prevented by the mayor from doing so. The mayor was held not to be liable, on the ground that the ordinance was valid and enforceable. That which was before the passage of the ordinance a legal act, became upon the adoption of the ordinance and by force thereof a legal nuisance, and as such was subject to abatement. The railroad in maintaining its grade above the general grade, endangers the public. By switching its trains up and down the

crowded right of way, it imperils the lives of citizens. By keeping its cars standing in this crowded way, it obstructs the passage of pedestrians and vehicles and still further imperils the lives of people passing to and fro. To prevent these evils is not the appropriation of the plaintiff's property. It is not a taking of private property for public use, but it is saying to the owner of the private property, "You shall not so use your private property as to injure others." The distinction between the exercise of power of eminent domain and the police power is found at this point. Whenever the public takes private property, it must pay for it; but whenever private property is so used as to injure the public, the public may prevent such use of it without compensating the owner.

Freund on Police Power, sections 511, 512.

The city of Goldsboro is not undertaking to appropriate any of the property of the plaintiff, but it is saying to the plaintiff that it must not so use its private property as to inflict injury upon the public. We do not want the right of way of plaintiff. It is the duty of a railroad at its own expense to remove a bridge maintained by it and also to erect a new bridge in conformity with regulations of drainage commissioners under the authority of the State.

R. R. v. Commissioners, 200 U. S., 562.

There is a difference between the exertion of the power to *establish* rates in such manner as to confiscate the property of a public service corporation by fixing them below a remunerative standard, and one compelling a corporation to render a service which it is essentially its duty to do.

R. R. v. Commissioners, 216 U. S., 216.

A COURT OF EQUITY HAS NO JURISDICTION TO RESTRAIN A STATE FROM PROSECUTING THE VIOLATION OF STATUTES AND ORDINANCES.

Ex parte Young, 209 U. S., 223, it is said, "that the distinction is observed between a case when the validity of the act de-

pends upon a fact which can be determined only after investigation of a very complicated and technical character, and the ordinary case of a statute upon a subjet requiring no such investigation and over which the jurisdiction of the Legislature is complete in any event."

In both of these cases, not only were the railroads subjected to severe penalties, but the agents were made indictable and punishable with severe punishments if they violated the acts in question. These facts were commented upon at length by the Supreme Court of the United States and really furnish the basis for the interposition of the court of equity. In our case, the ordinances do not provide for the punishment of any agent and the fine imposed in each case is only $50.

The want of equity in a bill to restrain the enforcement of a town ordinance is fully discussed and finally disposed of, so far as this State is concerned, in the case of *Paul v. Washington*, 134 N. C., page 363. Mr. Justice Walker, in a concurring opinion, goes into this subject at length. He quoted with approval from *Hottinger v. New Orleans*, 42 La. Ann., 629, the following:

> "If the ordinance is unconstitutional, as alleged, the plaintiff can suffer no injury and she has her remedy and can urge her defense in the recorder's court. Failing there, she has her remedy by appealing to this Court."

Scott v. Smith, 121 N. C., 94.
Cohen v. Com., 77 N. C., 2.
Feild v. Weston, 181 Ill., 186.
Kelly v. Conner, 25 L. R. A. (N. S.), 201.
16 A. and E., 370.

If the ordinances are void, plaintiff is not in the slightest danger. It can violate them with impunity. No one is under the slightest moral, much less legal, obligation to obey an unconstitutional ordinance or statute. The plaintiff can therefore disobey these ordinances, if they be void, without the slightest danger to itself. It is in no different position from

any other person who does not wish to obey any statute. Every person must determine at his peril whether any criminal statute is in accordance with the Constitution or not. If he chooses to violate it, the criminal court will determine his guilt or innocence, and will ascertain the validity or unconstitutionality of the statute, and this Court on appeal will correct any error into which the criminal court has fallen; and if the statute violates any provision of the Constitution of the United States, that Court on a writ of error will hear the matter and determine it. Where, then, is the authority for the interposition of the court of equity? But the plaintiff says: "If I should decide this matter wrong and violate the ordinance, the penalties, being $50 for each day's violation, would soon accumulate and become a very large amount, and I therefore ask the court of equity to protect me against indictment while I am ascertaining whether I shall or shall not violate these ordinances." Let us suppose that the court of equity does interfere and temporarily enjoin the enforcement of the ordinances in question. Let us suppose that this temporary restraining order is continued until the hearing. Let us suppose that at the hearing, all the facts being developed and found, it shall turn out that the ordinances are not unconstitutional, but are in perfect harmony therewith and are therefore valid. What would the judgment of the Court be? Would it not be that the restraining order heretofore granted in this case is dissolved? What, then, becomes of the protection which the plaintiff has invoked? WE ASSERT THAT NO COURT CAN PROTECT ANY ONE FROM PUNISHMENT FOR THE VIOLATION OF A LEGAL, CONSTITUTIONAL ORDINANCE. If it turns out on the final hearing that the ordinance is legal and constitutional, then it has been *the* LAW from the date of its enactment, and no court can prevent a sovereign State from punishing a violator of its LAW. If this be not true, then we have overturned the Bill of Rights. Section 9 of the Bill of Rights says:

> "All power to suspend laws, OR THE EXECUTION OF LAWS, *by any authority* without the consent of the representatives of the people is injurious to their rights and ought not to be exercised."

"The term 'laws' must signify such acts as the Legislature have authority to pass, for that cannot be called a law which the Constitution has forbidden to be enacted. The term 'suspend' implies that the act suspended once had an effectual and constitutional existence."

Jones v. Crittenden, 4 N. C., 55.

Mark that the equity insisted upon by the plaintiff is to protect it against the consequences of a valid law, for it assuredly needs no protection against the consequences of an unconstitutional ordinance.

Plaintiff's bill charges that the ordinances in question are void. If this be true, a court of equity needs not to be bothered with the plaintiff. It has itself ample protection in the court when indicted. IT IS MANIFEST THAT THE PLAINTIFF DOES NOT WANT TO BE PROTECTED AGAINST A VOID ORDINANCE, BUT WHAT IT DOES WANT IS TO BE PROTECTED AGAINST THE VALID ORDINANCE—*that is, that the State shall be restrained from ever prosecuting it for violation of the ordinance committed by it pending this inquiry.* The plaintiff, in its brief filed by its counsel, cites quite a number of cases in which courts have interposed. It is not disputed by us that hundreds, not to say thousands, of cases may be found on either side of the question as to the jurisdiction of the court of equity, but we maintain that when looked into it will be found that nearly all of the cases holding that the court of equity has jurisdiction have held that the ordinance in question was void. This shows confusion on the part of the courts. The first question which this Court must determine is, not whether the ordinance is void, but will the court of equity inquire into the constitutionality of an ordinance of a municipality when the plaintiff can defend itself in the criminal court and can avail itself of every possible plea in such court? In our case there are no penalties against the agents, and the agents would therefore not be intimidated by the ordinances. Why shall not the plaintiff, if it be-

lieves the ordinances to be void, ignore them, and, when indicted, set up the defense that the ordinances are invalid and not binding? No trespass is threatened by the defendant; no property is taken by it; no agent of the plaintiff is intimidated by it. It has merely passed its ordinances and says to the plaintiff, Obey them, if they are constitutional; disobey them if they are unconstitutional. On what grounds, therefore, can the court of equity intervene?

In addition to the above considerations, it is not to be overlooked that the total cost of conforming to section 5 of the ordinances, even according to the testimony of the plaintiff's own witnesses, did not exceed $4,500, and by the evidence of the defendant's witnesses did not exceed $3,000. The plaintiff's property in North Carolina is assessed for taxation at $28,434,900. The required expenditure of this small sum by it can, it seems to us, furnish no ground for the intervention of a court of equity. The plaintiff is not being oppressed—it can not be oppressed. If the ordinances are unconstitutional, they can not be enforced. If they are constitutional and are enforced, they will not be burdensome to any extent upon the plaintiff. The ordinance forbidding the shifting of cars in the main part of the city between certain hours on a thoroughfare that is constantly crowded, according to the plaintiff's own showing, can not be said to be oppressive. The ordinance forbidding the standing of cars in front of stores for a longer space of time than five minutes seems to us to be reasonable. The affidavits show that these cars are unloaded in front of business stores. The unloading of them at these places is unnecessary, and is in fact intended to give an advantage to shippers in carload lots. The stores which are inconvenienced and incommoded, and the public which is shut off by these cars standing in front of the stores, are daily injured and annoyed for the benefit of large shippers. The small shipper has to obtain his freight at the warehouse. The large shipper must unload his goods in the street, convenient to his store. And this gross violation of the equality of treatment of its customers is made the

basis of an application to a court of equity to restrain an ordinance! WE REITERATE: *If the ordinances are void, the plaintiff needs no aid of a court of equity. If they are not void, a court of equity can not suspend the execution of the law.*

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